Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decision

19 CFR Part 4

(T.D. 91-63)

ADDITION OF LUXEMBOURG TO THE LIST OF NATIONS ENTITLED TO SPECIAL TONNAGE TAX EXEMPTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pursuant to information provide by the Department of State, the Customs Service has found that Luxembourg does not impose discriminating duties of tonnage or imposts upon vessels belonging to citizens of the U.S., and that, accordingly, vessels of Luxembourg are exempt from special tonnage taxes and light money in ports of the United States. This amendment adds Luxembourg to the list of nations whose vessels are exempt from the payment of any higher tonnage duties than are applicable to vessels of the U.S. and from the payment of light money.

EFFECTIVE DATES: The reciprocal privileges for vessels registered in the Luxembourg became effective on January 1, 1991. This amendment is effective July 26, 1991.

FOR FURTHER INFORMATION CONTACT: Barbara E. Whiting, Carrier Rulings Branch. (202-566-5706).

SUPPLEMENTARY INFORMATION:

Background

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified mount per ton, called "light money", on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any

higher tonnage duties than are applicable to vessels of the U.S. and from the payment of light money. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations and Disclosure Law Branch.

Finding

On the basis of the information received from the Department of State regarding the absence of discriminatory duties of tonnage or impost imposed on U.S. vessels in the ports of Luxembourg, the Customs Service has determined that vessels of Luxembourg are exempt from the payment of the special tonnage tax and light money, effective January 1, 1991, and that the Customs Regulations should be amended accordingly.

Inapplicability of Public Notice and Delayed Effective Date Requirements, The Regulatory Flexibility Act and Executive Order 12291

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(3)(B), notice and public procedure thereon are unnecessary; further, for the same reason, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a "major rule" as defined in E.O. 12291. Accordingly, a regulatory impact analysis is not required.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 4

Customs duties and inspection, Cargo vessels, Maritime carriers, Vessels.

Amendment to the Regulations

Accordingly, Part 4 of the Customs Regulations (19 CFR Part 4) is amended as follows:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1624; and 46 U.S.C. App. 3;

* * * * * * *

§ 4.22 also issued under 46 U.S.C. App. 121, 122, 141;

* * * * * * *

§ 4.22 (Amended)

2. Section 4.22 is amended by inserting "Luxembourg" in appropriate alphabetical order.

Dated: July 18, 1991.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, July 26, 1991 (56 FR 34149)]

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., July 24, 1991.

The following are decisions of the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(C.S.D. 91-14)

This ruling addresses the tariff status accorded certain rings (jewelry) under the Harmonized Tariff Schedule of the United States which will be imported from the Dominican Republic.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., January 2, 1991.

File: HQ 555801
CLA-2 CO:R:C:V 555801 KCC
Category: Classification
Tariff No.: 9802.00.60 - 9802.00.80

MR. WILLIAM J. LECLAIR
TRANS-BORDER CUSTOMS SERVICES, INC.
One Trans-Border Drive
P.O. Box 800
Champlain, New York 12919

Re: Tariff treatment applicable to rings (jewelry) to be imported from the Dominican Republic. Mounting; casting; CBERA; substantial transformation; product of; 554448; U.S. Note 2(b), subchapter II, Chapter 98; eligible article; precious metal; assembly; 19 CFR 10.16(a)

DEAR MR. LECLAIR:

This is in response to your letter dated November 27, 1990, on behalf of IRCA Metal Spinning Inc., requesting a ruling concerning whether

rings (jewelry) will be eligible for a duty exemption under the Harmonized Tariff Schedule of the United States (HTSUS) when returned to the U.S. from the Dominican Republic.

Facts:

IRCA intends to ship U.S. origin precious metal ring castings, U.S. origin gem stones, foreign gem stones, and precious metal alloys (origin unknown) to the Dominican Republic. In the Dominican Republic, IRCA intends to manufacture rings using one of the following three options. The first option involves mounting foreign gem stones onto U.S. origin castings, producing an unfinished ring. The unfinished ring will be returned to the U.S. for grinding, buffing and polishing operations. The second option involves mounting U.S. origin gem stones onto U.S. origin castings, producing an unfinished ring which will be returned to the U.S. for grinding, buffing and polishing operations. The third option involves casting precious metal alloys into a ring into which a foreign origin gem stone will be mounted. Thereafter, the ring will be shipped to the U.S.

Issue:

Whether the rings will be eligible for a duty exemption under the HTSUS when returned to the U.S.

Law and Analysis:

All articles imported into the U.S. are subject to duty unless specifically exempted therefrom under the HTSUS. To determine the duty applicable to an imported article, it must be properly classified in a HTSUS tariff provision. Generally, jewelry is classified under one of the tariff provisions in Chapter 71 of the HTSUS. However, without samples or a detailed description of the rings, we are unable to classify the rings at this time.

Articles imported into the U.S. from the Dominican Republic may be exempt from duty under the Caribbean Basin Economic Recovery Act (CBERA) (19 U.S.C. 2701–2706). Under the CBERA, eligible articles the growth, product or manufacture of designated beneficiary countries (BC's) may receive duty-free treatment if such articles are imported directly to the U.S. from a BC, and if the sum of 1) the cost or value of the materials produced in a BC or BC's, plus 2) the direct cost of processing operations performed in a BC or BC's, is not less than 35% of the appraised value of the article at the time it is entered into the U.S. *See*, 19 U.S.C. 2703(a). The cost or value of materials produced in the U.S. may be applied toward the 35% value-content minimum in an amount not to exceed 15% of the imported article's appraised value. *See*, section 10.195(c), Customs Regulations (19 CFR 10.195(c)).

All jewelry described in Chapter 71, HTSUS, is eligible for CBERA treatment. Therefore, in this analysis, we are assuming IRCA's rings will fall under a CBERA-eligible tariff provision.

Where an article is produced from materials imported into a BC from non-BC's, as in this case, the article is considered a "product of" the BC

only if those materials are substantially transformed into a new or different article of commerce. *See*, 19 CFR 10.195(a). In the present situation, the cost or value of the U.S. and foreign origin components to be imported into the Dominican Republic may be counted toward satisfying the 35% value-content requirement (over and above the 15% cap on U.S. materials) only if there is a finding that the components were subjected to a double substantial transformation in the Dominican Republic. *See*, section 10.196(a), Customs Regulations (19 CFR 10.196(a)).

The test for determining whether a substantial transformation occurs is whether an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing. *Texas Instruments Inc. v. United States*, 69 CCPA 152, 681 F.2d 778 (1982).

We are of the opinion that the rings manufactured in accordance with the first two options will not be entitled to duty free treatment under the CBERA pursuant to 19 CFR 10.195(a)(2)(i)(B). This provision states that no article or material shall be considered to have been grown, produced, or manufactured in a BC by virtue of having merely undergone simple combining or packaging operations, which includes fitting together a small number of components by bolting, gluing, soldering, etc. *See also*, Headquarters Ruling Letter (HRL) 554448 dated August 25, 1987 (setting artificial stones into jewelry is not considered a substantial transformation of the jewelry into a "product of" a BC). Since only two components are fitted together, mounting a gem stone onto a ring casting is considered a simple combining operation pursuant to 19 CFR 10.195(a)(2)(i)(B) and, therefore, the rings in the first and second options will not be considered "products of" the Dominican Republic.

According to 19 CFR 10.195(a)(2)(ii)(D), a simple combining or packaging operation shall not include a simple combining or packaging operation coupled with any other type of processing such as testing or fabrication. Consistent with this regulation, we are of the opinion that the third option, involving casting the precious metal alloys into a ring and then mounting the ring with a gem stone, results in a substantial transformation of the components into a "product of" the Dominican Republic. Although mounting the ring with the gem stone is considered a simple combining operation, because it is coupled with a fabrication – the casting of the precious metal alloys into a ring –, the finished article will be considered a "product of" the Dominican Republic. Accordingly, if the rings meet the 35% value-content minimum and are imported directly into the U.S., they will be entitled to duty-free treatment under the CBERA.

Section 222 of the Customs and Trade Act of 1990 (Public Law 101-382) amended U.S. Note 2, subchapter II, Chapter 98, HTSUS, to provide for the duty free treatment of articles (other than textile and apparel articles and petroleum and petroleum products) which are assembled or processed in a CBERA beneficiary country wholly of fabricated components or ingredients (except water) of U.S. origin. This

amendment was effective with respect to goods entered on or after October 1, 1990.

We are of the opinion that the jewelry produced under the second option may enter the U.S. duty free pursuant to U.S. Note 2(b), subchapter II, Chapter 98, HTSUS. Only U.S. origin components are used during the foreign operation which merely involves the assembly of a gem stone with a ring casting. Enclosed is a copy of a telex dated September 28, 1990, to Customs field offices setting forth procedures for entry under U.S. Note 2(b), subchapter II, Chapter 98, HTSUS.

Subheading 9802.00.60, HTSUS, provides a partial duty exemption for:

> [a]ny article of metal (as defined in U.S. note 3(d) of this subchapter) manufactured in the United States or subjected to a process of manufacture in the United States, if exported for further processing, and if the exported article as processed outside the United States, or the article which results from the processing outside the United States, is returned to the United States for further processing.

This tariff provision imposes a dual "further processing" requirement on eligible articles of metal—one foreign, and when returned, one domestic. Metal articles satisfying these statutory requirements may be classified under this tariff provision with duty only on the value of such processing performed outside the U.S., provided there is compliance with the documentary requirements of section 10.9, Customs Regulations (19 CFR 10.9)

Eligible articles of metal are defined in U.S. note 3(d) of subchapter II which provides that:

> [f]or purposes of subheading 9802.00.60, the term "*metal*" covers (1) the base metals enumerated in additional U.S. note 1 to section XV; (2) arsenic, barium, boron, calcium, mercury, selenium, silicon, strontium, tellurium, thorium, uranium, and the rare-earth elements; and (3) alloys of any of the foregoing.

Base metals are further enumerated in additional U.S. note 1 to section XV which provides:

> [f]or the purposes of the tariff schedule, the term "*base metals*" embraces aluminum, antimony, beryllium, bismuth, cadmium, chromium, cobalt, copper, gallium, germanium, hafnium, indium, iron and steel, lead, magnesium, manganese, molybdenum, nickel, niobium (columbium), rhenium, tantalum, thallium, tin, titanium, tungsten, vanadium, zinc and zirconium.

Since the rings in each option will be made of precious metal alloys (such as gold and silver), they are not considered eligible articles of metal within the meaning of this tariff provision. Therefore, they are not be eligible for the partial duty exemption available under subheading 9802.00.60, HTSUS.

Another special tariff provision is subheading 9802.00.80, HTSUS, which provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating, and painting.

All three requirements of subheading 9802.00.80, HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full cost or value of the imported assembled article, less the cost or value of the U.S. components assembled therein, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners.

Merely attaching the foreign gem stone with the U.S. origin ring casting in the first option is considered an acceptable assembly operation pursuant to 19 CFR 10.16(a). Additionally, the second option, attaching the U.S. origin gem stone with the U.S. origin ring casting, is an acceptable assembly operation within the meaning of this tariff provision. Therefore, a duty exemption is available for the cost or value of the U.S. origin components when the rings are returned to the U.S.

Holding:

Based on the information presented, the rings merely mounted with a gem stone (the first and second option) are not considered "products of" the Dominican Republic, and, therefore, are not entitled to CBERA treatment. However,the rings manufactured in the Dominican Republic by casting and mounting with a gem stone (the third option) are considered "products of" a BC for purposes of the CBERA. Therefore, assuming that they are imported directly into the U.S., and the 35% value-content requirement is satisfied, these rings will be entitled to duty-free treatment under the CBERA.

The rings which are entirely assembled from U.S. components (the second option) may enter the U.S. duty free pursuant to U.S. Note 2(b), subchapter II, Chapter 98, HTSUS, provided the documentation requirements set forth in the attached telex dated September 28, 1990, are satisfied.

The rings which are merely assembled from U.S. and foreign components (the first option) are entitled to the partial duty exemption available under subheading 9802.00.80, HTSUS. Therefore, an allowance may be made under this tariff provision for the cost or value of the U.S.

origin ring casting, upon compliance with the documentary requirements of 19 CFR 10.24.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-15)

This ruling addresses the duty free eligibility under the Generalized System of Preferences of industrial high density hydraulic balers manufactured in Mexico of materials of non-Mexican origin (19 U.S.C. 2461 - 2465).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., January 7, 1991.

File: HQ 555702
CLA-2 CO:R:C:V 55702 SER
Category: Classification

STEVEN S. WEISER, ESQ.
SIEGEL, MANDELL & DAVIDSON, P.C.
One Whitehall Street
New York, NY 10004

Re: Eligibility of industrial high density hydraulic balers from Mexico for duty-free treatment under the GSP

DEAR MR. WEISER:

This is in reference to your letter of July 25, 1990, on behalf of Piqua Engineering, Inc., in which you request a ruling on the applicability of the Generalized System of Preferences (GSP)(19 U.S.C. 2461-2465) to high density hydraulic balers from Mexico.

Facts:

According to your submission, Piqua is contemplating importing industrial high density hydraulic balers ("balers"), which will be manufactured in Mexico. You state that most of the materials used in manufacturing the balers will be of non-Mexican origin.

The major components used in the production of the balers will be made in Mexico from large steel plates to be imported into Mexico. The dimensions of virtually all the steel plates imported into Mexico are as follows: 1/2″ × 42″ × 60″; 1/4″ × 100″ × 52″; 1/4″ × 45″ × 65″; 1/4″ × 30″ × 60″; 3/8″ × 36″ × 60″; or 1/4″ × 48″ × 96″. Approximately ten sheets of the steel plate of the above sizes are used in the production of the baler components. In Mexico, the steel will be marked, cut, and then shaped into various components needed to manufacture the final article – the baler. The cutting of the steel involves shearing and flame torch cutting. The

shaping is done by means of folding, bending, scraping, drilling, grinding, etc.

The components manufactured in Mexico from the steel plate will include the base, crown, left and right sides, main door, safety gate, front cover plate, back, door flap, platen, and counter weight.

The manifold is manufactured from raw aluminum blocks, 3″ × 4″ × 5″ in size. All six sides of the blocks are bored and fitted with valves to service the hydraulics of the baler. The base of the hydraulic cylinder is also manufactured from imported steel.

After the manufacture of the above-described baler components in Mexico from steel plate and other materials, these components will be combined with various components from other countries, mainly the U.S., to create the finished baler. These additional components include the junction box, manifold, gate up-limit switch, crown, motor/pump, hydraulic cylinder, control box, control box components and other miscellaneous parts.

The final assembly process to create the finished article is a very detailed, complex operation which involves significant welding, soldering, torching and bolting of numerous discrete components.

Issue:

Whether the steel plate imported into Mexico and used in the manufacture of the balers undergoes a dual substantial transformation so that the cost or value of these materials may be counted toward satisfying the 35% value-content requirement under the GSP.

Law and Analysis:

Under the GSP, eligible articles the growth, product, or manufacture of a designated beneficiary developing country (BDC), which are imported directly from a BDC into the U.S. qualify for duty-free treatment if the sum of 1) the cost or value of the materials produced in the BDC, plus 2) the direct cost involved in processing the eligible article in the BDC is at least 35% of the article's appraised value at the time it is entered into the U.S. *See* 19 U.S.C. § 2463.

Mexico is a BDC, *see* General Note 3(C)(ii)(A), Harmonized Tariff Schedule of the United States Annotated (HTSUSA). In addition, Customs has previously ruled that the balers are classified as other packing or wrapping machinery in subheading 8422.40.9080, HTSUSA, which is a GSP eligible provision. *See* New York Ruling Letter (NYRL) 850321 dated March 22, 1990.

If an article is comprised of materials that are imported into the BDC, the cost or value of those materials may be included in calculating the 35% value-content requirement only if they undergo a "double substantial transformation" in the BDC. *See* section 10.177(a), Customs Regulations (19 CFR § 10.177(a)). *Azteca Milling Co. v. United States*, 703 F.Supp. 949 (CIT 1988), *aff'd*, 890 F.2d 1150 (Fed. Cir. 1989).

A substantial transformation occurs when a new and different article of commerce emerges from a process with a new name, character or use

different from that possessed by the article prior to processing. *Texas Instruments, Inc. v. United States*, 69 CCPA 152, 681 F.2d 778 (1982).

In general, Customs has held that cutting or bending materials to defined shapes or patterns suitable for use in making finished articles, as opposed to mere cutting to length and/or width which does not dedicate the resulting material to a particular use, constitutes a substantial transformation. In Headquarters Ruling Letter (HRL) 055684 of August 14, 1979, Customs held that those components of a water cooler gas absorption refrigeration unit which were formed by cutting to length, and bending imported steel tubes into the component shapes and configurations, or by cutting to length, flattening, and drilling holes into imported tubing, were substantially transformed constituent materials for GSP purposes, while those imported tubes which were simply cut to length and assembled into the final articles were not.

In addition, in HRL 555532 dated September 18, 1990, Customs held that the creation of top and bottom pans, used in the production of water heaters, by blanking the steel materials, die forming (or drawing), and die piercing constituted a substantial transformation. The case that you cite, HRL 055684 dated August 14, 1979, held that "the cutting and stamping of the undefined sheet of metal and the lengths of square shafts into an absorber box results in a substantially transformed product." In addition, in that ruling Customs found that the result of the above described process was the creation of new and different articles, each of which has a distinct character and use that is not inherent from the materials from which they were derived.

Based on the above cited rulings, the processes to which steel plates are subjected in Mexico – cutting by means of shearing and flame torch cutting; shaping by means of folding, bending, scraping, drilling, and grinding – results in various components that are dedicated to use in the assembly of the final article and are considered substantially transformed products.

The final assembly of the balers is a complex and detailed process. It involves not only the substantially transformed intermediate articles but also numerous other components, and requires a significant number of different operations to complete the product. Many of these operations involve significant welding procedures in addition to the soldering, torching and bolting operations. As a result of the final complex assembly operation, a new and different finished article of commerce emerges with a name, character and use different from the numerous components of which it is made. *See* C.S.D. 85-25 dated September 25, 1984 (HRL 071827). As the steel plate imported into Mexico is subjected to the requisite double substantial transformation, its cost or value may be counted toward the 35% value-content requirement.

Holding:

The components manufactured in Mexico from steel plate imported into that country are considered substantially transformed constituent materials of the hydraulic baler. Therefore, the cost or value of these

materials may be counted toward satisfying the 35% value-content requirement under the GSP.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–16)

This ruling sets forth procedural guidelines to be followed in instances of recurring non-compliance with country of origin marking requirements (19 U.S.C. 1304) and specifically those marking requirements applicable to watch movements and cases (19 U.S.C. 1202).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 8, 1991.

File: HQ 733856
MAR 2-05 CO:R:C:V 733856 LR

DISTRICT DIRECTOR OF CUSTOMS
Miami, Florida

Re: Procedures to be followed in cases of habitual non-compliance with the marking requirements set forth in 19 U.S.C. 1304 and 19 U.S.C. 1202; special watch marking; 19 CFR 134.51; 19 CFR 134.52; 19 CFR 134.53; 19 CFR 134.55; 19 CFR 11.9; certification procedure

DEAR MADAM:

This is in response to your memorandum dated October 4, 1990, regarding the procedures to be followed when imported merchandise is not legally marked.

Facts:

You indicate that several importers in your district habitually import goods which are not legally marked. Because of their history, these importers incur 100% intensive examinations, and generate CF's 4647 as a matter of routine. You also indicate that under current procedures the importer is routinely given permission to mark the violative goods at his premises. Upon completion of the marking, the importer submits a certification that the merchandise has been marked and you send an inspector out to verify that the marking is proper and complete. In your opinion the current system places an unnecessary drain on your limited inspectional and import specialist resources because every one of these shipments must be intensively examined, a CF 4647 issued, and certification reviewed and verified. Failure to examine even one, will result in the release of noncomplying goods into the commerce.

The example you cite relates to the importation of certain Seiko watches. Chapter 91, Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) requires, among other things, that watch cases shall be marked on the inside or outside of the back cover to show the name of the country of manufacture and either the name of the manufacturer (Seiko) or the purchaser (the U.S. importer). At the time of importation, some Seiko watch cases have inscribed on them neither the name of manufacturer nor the name of the importer, but only the name of the licensed exclusive U.S. distributor (Seiko Time Corp). After importation, in order to comply with the special marking requirements, the importers grind off the words "Time Corp." leaving only the name "Seiko", which happens to be the name of the manufacturer. You indicate that these importers employ people and have special equipment for the purpose of correcting the marking.

Although you believe that the occasional noncomplying shipment can be tolerated and fixed after importation, you urge that situations involving habitual noncomplying shipments, such as the situation noted above, be handled differently. You propose that Customs implement a policy whereby the habitual violator of the marking statute is not permitted to mark noncomplying goods at his premises.

Issue:

What procedures should Customs follow when a person routinely imports merchandise which is not legally marked?

Law and Analysis:

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), generally requires that every article of foreign origin imported into the U.S. shall be marked to indicate the name of its country of origin. Chapter 91, Additional U.S. Note 4, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) sets forth special marking requirements which are applicable to watch movements and cases.

Part 134, Customs Regulations (19 CFR Part 134), sets forth regulations implementing the country of origin marking requirements and exceptions of 19 U.S.C. 1304 together with certain marking provisions of the HTSUS, including the special marking requirements for watch movements and cases (see 19 CFR 134.43(b) and 19 CFR 11.9). The consequences and procedures to be followed when articles are not legally marked are also set forth in 19 CFR Part 134. These procedures apply both to merchandise which is not marked in compliance with 19 U.S.C. 1304 and to merchandise which is not marked in compliance with the provisions of the HTSUS, including Additional U.S. Note 4, Chapter 91, HTSUS. See 19 CFR 134.0 regarding the scope of 19 CFR Part 134.

Specifically, 19 CFR 134.51(a) provides that when articles or containers are found upon examination not to be legally marked, the district director shall notify the importer on Customs Form 4647 to arrange with the district director's office to properly mark the article or containers, or to return all released articles to Customs custody for marking,

exportation, or destruction. 19 CFR 134.51(c) provides that verification of marking shall be at the expense of the importer and shall be performed under Customs supervision unless the district accepts a certification as provided for in 19 CFR 134.52 in lieu of marking under Customs supervision.

The procedure outlined in your memo which is currently used in your district following the importation of not legally marked merchandise is essentially the certification procedure, set forth in 19 CFR 134.52 in which the district director accepts a certificate of marking in lieu of marking under Customs supervision. Under this procedure, after the district director notifies the importer on Customs Form 4647 that the merchandise is not properly marked the importer submits a certificate of marking, usually supported by samples, certifying that the goods have been legally marked. Customs then performs spot checks to ensure that the importer has marked the merchandise in accordance with the certification. Generally, the importer is given permission to mark the merchandise at his premises. The district director notifies the importer when the certificate of marking is accepted. There are penalties which apply when the importer files a false certification.

The primary benefit of the certification procedure is that it is not too burdensome for the importer. This procedure enables the importer to correct a marking problem without expense or inconvenience. The drawbacks of this procedure are that numerous spot checks by Customs are required to ensure that the goods have been marked as certified and the importer is not given any incentive to import legally marked goods in the future. In the case of the occasional violator, however, the benefits of the procedure generally outweigh the drawbacks.

This is not the case with respect to the habitual violator. As you note in your memo, with regard to the person who routinely imports merchandise which is not legally marked, this procedure places a drain on Customs limited inspectional and import specialist resources because for every shipment, the merchandise must be examined, a CF 4647 issued, and the certification reviewed and verified. Also, because this procedure makes it so easy to correct marking after importation, the importer is given no incentive to bring in legally marked merchandise at the time of importation. In order to prevent not legally marked merchandise from entering the country, Customs must thoroughly examine each subsequent shipment for marking.

The certification procedure set forth in 19 CFR 134.52, which allows the importer to mark the goods at his premises without Customs supervision, is not, however, the only procedure which is available to Customs when the imported merchandise is not legally marked. The district director may require the importer to mark the articles under Customs supervision. In this regard, 19 CFR 134.51(c) states that verification of marking shall be performed under Customs supervision unless the district director accepts a certificate of marking in lieu of marking under Customs supervision. 19 CFR 134.52(e) states that the district director

may require physical supervision of marking as specified in section 134.51(c) in those cases in which he determines that such action is necessary to insure compliance with this part. In the case of the importer who routinely imports merchandise which is not legally marked, a strong case for requiring actual Customs supervision can be made.

When actual Customs supervision is required, the regulations provide that the expenses of the Customs officer shall be reimbursed to the government by the importer. See 19 CFR 134.51(c), 19 CFR 134.52(e), and 19 CFR 134.55. In addition, as set forth below, although Customs cannot require the importer to mark the goods at the place where they have been discharged from the importing or bonded carrier if it is impracticable for the importer to do so, the district director may require the importer to deposit estimated marking duties and adequate security for Customs expenses before allowing the importer to perform the marking at his premises.

In this regard, 19 CFR 134.53(a)(1) provides that articles (or containers) in examination packages may be marked by the importer at the place where they have been discharged from the importing or bonded carrier or in the public stores. However, 19 CFR 134.53(2) provides that if it impracticable to mark the articles (or containers) in examination packages as provided in paragraph (a)(1) of this section, the merchandise may be turned over to the importer after the amount of duty, estimated to be payable under 19 U.S.C. 1304(C) (now 1304(f)) has been deposited to insure compliance with the marking requirements and the payment of any additional expense which will be incurred on account of Customs supervision (emphasis added). (The district director may at his discretion accept the bond on Customs Form 301, containing the basic importation and entry bond conditions set forth in section 113.62 of this chapter as security).

Based on the emphasized language, we conclude that if it is impracticable for the importer to correct the marking at the place where the merchandise is discharged from the carrier, the merchandise should be released to the importer to mark the goods at another location provided adequate security for both marking duties and Customs supervision expenses is deposited. Whether the importer's request to mark the noncomplying merchandise at his premises should be granted hinges on whether it is impracticable for the importer to mark the goods where they are delivered, and whether adequate security is deposited.

To summarize, the district director has various ways to encourage the importer who routinely brings in merchandise which is not legally marked to discontinue this practice. First, instead of utilizing the certification procedures, the district director may require actual Customs supervision of the marking at the importers expense. Second, in appropriate cases, the district director may require the importer to mark the goods at the place where they are discharged from the carrier instead of at the importer's premises. Finally, if the importer is given permission to mark the merchandise at his premises, the district

director may require in advance the payment of estimated marking duties and anticipated Customs expenses as security (i.e., instead of accepting the entry bond as security).

It is up to each district director to determine which procedures should be followed when not legally marked merchandise is imported. Some factors to be considered include the previous history of the importer, the number of CF 4647's the importer has received, whether previous spot checks have revealed problems of noncompliance, and whether Customs has the personnel and resources necessary to perform the spot checks, etc.

Holding:

When an importer routinely imports merchandise into the U.S. which is not legally marked, the district director is not required to utilize the certification procedure set forth in 19 CFR 134.52. The district director may utilize one or more of the procedures discussed above.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–17)

This ruling holds that the Alcohol, Tobacco and Firearms (ATF) Form 2149 certifying receipt of tobacco products in an ATF bonded warehouse does not constitute sufficient evidence establishing actual exportation in lieu of evidence required to substantiate the exportation of drawback articles as required by Subpart E, Part 191, of the Customs Regulations.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 26, 1991.

File: HQ 220745
DRA-1-CO:R:C:E 220745
Category: Drawback

ASSISTANT REGIONAL COMMISSIONER
U.S. CUSTOMS SERVICE
COMMERCIAL OPERATIONS
SOUTHEAST REGION
909 S.E. First Ave.
Miami, Florida 33131-2595

Re: Proof of Exportation For Drawback; Revocation of Unpublished Ruling Dated July 27, 1979, and Affirmation of C.S.D. 80-129

DEAR SIR:

The following is in response to your request for Internal Advice dated July 15, 1988.

Facts:

An unpublished ruling dated July 27, 1979 (210704), held that the Alcohol, Tobacco and Firearms (ATF) Form 2149, which certifies that certain tobacco products were removed from a bonded ATF factory and were received in an ATF bonded export warehouse, may be used to prove exportation under manufacturing drawback (19 U.S.C. 1313(a) & (b)) in lieu of the evidence required to support an uncertified notice of exportation by section 22.7(c) of the Customs Regulations (now found in section 191.52(c) (2)). In some instances, as a result of the unpublished ruling, tobacco products received in an ATF bonded export warehouse were not in fact exported as required by the drawback law.

In a similar case, published as Customs Service Decision 80-129, we held that the transfer of distilled articles from a bonded internal revenue distilled spirits plant or export storage facility to a Customs bonded warehouse for storage pending exportation did not constitute exportation for drawback as required under 19 U.S.C. 1313 (a) & (b).

The Office of the Regional Commissioner of Customs, Southeast Region, expressed the opinion that the unpublished ruling is in conflict with the published ruling and requested revocation of the unpublished ruling.

Issue:

The issue is whether the filing of ATF Form 2149 with a drawback entry, certifying that tobacco products, which may also be eligible as manufacturing drawback products, were received in an ATF bonded export warehouse is sufficient evidence to prove actual exportation in lieu of the evidence required to support an uncertified notice of exportation by section 191.52(c)(2), of the Customs Regulations.

Law and Analysis:

The manufacturing drawback law, 19 U.S.C. 1313(a), (b), & (i), requires that articles manufactured under drawback conditions must be exported within 5 years after the importation of the imported duty-paid merchandise which is the basis for the payment of drawback. Exportation for drawback is a mandatory statutory requirement and cannot be waived. The Customs Regulations, 19 Code of Federal (CFR), defines the term "exportation" and set forth the mandatory requirements for the submission of evidence to establish that articles are, in fact, exported for drawback.

Section 101.1(k) of the Customs Regulations defines the term "Exportation", in part, as meaning the "severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country." There must be an intent to export and a departure from the United States. (*See The National Sugar Refining Company v. United States*, 26 Cust. Ct. 97, C.D. 1307 (1951) and affirmed by the Court of Customs and Patent Appeals, 39 CCPA 96, C.A.D. 470 (1951)). An exception to the departure rule for manufactured drawback products is by statute, the fourth proviso of 19

U.S.C. 81c, of the Foreign Trade Zone law. It provides, in part, that articles taken (admitted) into a zone from the Customs territory for the sole purpose of exportation, destruction, or storage shall be considered to be exported for the purpose of the drawback law.

Section 191.13 of the Customs Regulations, provides, in part, that "under 19 U.S.C. 1313, there is no authority of law for the allowance of drawback of Customs duty on articles manufactured or produced in the United States and shipped to Puerto Rico, the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Guam, Canton Island, Enderbury Island, Johnston Island, or Palmyra Island."

The regulations for an ATF bonded export warehouse are found in Title 27 CFR, Part 290. The definition for the term "exportation or export", in section 290.11, similar to the Customs definition, states in part, that the term means "a severance of tobacco products or cigarette papers or tubes from the mass of things belonging to the United States with the intention of uniting them to the mass of things belonging to some foreign country." *However*, the definition goes on to state that "for purposes of this part, shipment from the United States to Puerto Rico, the Virgin Islands, or a possession of the United States, shall be deemed exportation * * *". This part of the regulation is directly opposite to what constitutes exportation as found in section 191.13 of the Customs Regulations for manufacturing drawback.

Further, there is no time limitation in which tobacco products must be exported from an ATF bonded export warehouse, whereas, under manufacturing drawback, the articles exported for drawback must be exported within 5 years after the importation of the imported duty-paid merchandise which is the basis for the payment of drawback.

Further, tobacco products received into an ATF bonded export warehouse may be transferred to an ATF bonded manufacturing factory (27 CFR Part 270) and then it is theoretically possible that in compliance with the applicable ATF laws and regulations the products may be withdrawn for domestic consumption upon payment of the internal revenue tax. In such a situation, there is no departure of articles from the United States with the intention of uniting the articles with the mass of things belonging to some foreign country to satisfy the exportation requirement for drawback.

The mandatory alternative procedures for the submission of evidence of exportation for manufacturing drawback are contained in Subpart E, Part 191, of the Customs Regulations. Essential contents required on a notice of exportation, Customs Form (CF) 7511 are the name of the exporting vessel or other carrier of the exported goods, the number and kinds of packages, description of the merchandise, the name of the exporter, and the *country of ultimate destination*.

In addition to the information to identify the merchandise, the regulations require evidence of actual exportation. If a claimant selects the certified notice of procedure, the CF 7511 must include a shipper's export declaration or the ocean/airway export bill of lading to permit the

Customs officer to compare the information with the outbound manifest and certify the exportation of the articles. An uncertified notice of exportation (which was the subject of the unpublished ruling) shall be supported by documentary evidence of exportation, such as the bill of lading, air waybill, freight waybill, Canadian Customs manifest, cargo manifest, or certified copies thereof, issued by the exporting carrier. Further, supporting documentary evidence shall establish fully the time and the fact of exportation and the identity of the exporter. The alternative exporter's summary procedure, if approved, is intended to help save paperwork in the filing of drawback claims, however, the claimant must maintain the records required by the certified or uncertified notice of exportation for three years after payment of claims for possible verification of the records by Customs officials.

None of the alternative procedures waives the requirement to provide documentary evidence to establish that articles have indeed been exported for drawback. The ATF Form 2149 which does not contain essential information and is not supported by documentary evidence of actual exportation is not acceptable to establish exportation for drawback.

We note that to satisfy the ATF bond, 27 CFR 290.223 requires, in part, as proof of export to relieve the internal revenue tax that the claimant shall furnish within a reasonable time, evidence of satisfactory compliance that the tobacco products, cigarette papers and tubes have been landed at some port beyond the jurisdiction of the internal revenue laws of the United States.

We further note that the ATF regulations provide for inventory accountability and the liability of internal revenue tax for any shortages. The Customs Service has no control over those procedures to protect the revenue under the drawback laws. Nor should the Customs Service be involved in those procedures.

We further note that the ATF regulations (27 CFR 290.207a) provide that any tobacco products removed from an ATF bonded export warehouse for delivery to a foreign trade zone must be admitted into the zone in restricted status for exportation or storage. This is in conformity with the Foreign Trade Zone law and the applicable Customs Regulations (Subpart P, Part 191).

Holding:

The use of ATF Form 2149/2150 certifying that tobacco products were received in an ATF bonded export warehouse is not sufficient evidence to establish actual exportation in lieu of the evidence required to support the exportation of drawback articles as required by Subpart E, Part 191, of the Customs Regulations.

Effect on Other Rulings:

The unpublished ruling dated July 27, 1979 (210704) is revoked and Customs Service Decision 80-129 is affirmed.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-18)

This ruling holds that same condition drawback and manufacturing are not complementary provisions (19 U.S.C. 1313 (j)(1) and 19 U.S.C. 1313 (j)(4)). Failure to qualify under the former does not constitute automatic qualification under the latter. C.S.D. 84-19 is hereby clarified.

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., April 8, 1991.

File: HQ 222409
DRA-2-01-CO:R:C:E 222409 C
Category: Drawback

ASSISTANT REGIONAL COMMISSIONER, OPERATIONS
U.S. CUSTOMS SERVICE
PACIFIC REGION
One World Trade Center
Long Beach, CA 90831-0700

Re: 19 U.S.C. 1313(j)(1), same condition drawback; 19 U.S.C. 1313(j)(4) incidental operations

DEAR SIR/MADAM:

This responds to your May 16, 1990, internal advice request, concerning the application of Customs Service Decisions (CSD) 84-19 and 89-73 to several operations performed on imported merchandise (DRA-2-O:C:T RMA). The company performing these operations has an approved drawback proposal which, in light of CSD 89-73, may have to be modified. The internal advice request inquires as to the applicability of manufacturing or same condition drawback to the operations involved.

Facts:

The company imports stereophonic equipment. As we understand it, five basic operations are performed on this imported merchandise:

1. Imported merchandise is altered from 110 volt capacity to 240 volt capacity. The alteration is performed on receivers, tuners, compact disc players, and amplifiers.
2. Imported merchandise is altered from 110 volt capacity to permit switching from 110 volt to 240 volt capacity. The alteration is performed on receivers.

3. Imported merchandise is altered to meet CSA requirements of Canada. The alteration is performed on receivers.
4. Imported amplifier kits are assembled before exportation.
5. Imported woofers are used in the assembly of speakers.

Operations one through three above involve the partial disassembly of the merchandise and one or more of the following adjustments: soldering to add or remove and replace certain parts, adjusting switches to effect changed voltage capacity, remove and replace fuses, add by gluing a metal screen to the inside of a unit, and add labels as appropriate. Operations four and five involve full assembly procedures.

Issues:

1. Is manufacturing or same condition drawback applicable to the operations summarized above?

2. What is the effect of CSD 89-73 on CSD 84-19, or, more specifically, are manufacturing and same condition drawback complementary and contiguous provisions, such that operations which fail to qualify for the former automatically qualify for the latter?

Law and Analysis:

The same condition drawback law, 19 U.S.C. 1313(j)(1), provides that imported, duty-paid merchandise that is exported in the same condition as when imported can be designated for drawback. There are two major conditions to recovery of drawback: 1) the obvious one - merchandise must be in the same condition at the time of exportation, and 2) it cannot be used in the United States before exportation. (See 19 U.S.C. 1313(j)(1)(A)(i) and 1313(j)(1)(B), respectively.) Generally, this means that if the merchandise is altered in any way, through accident, deterioration, or voluntary act, it cannot be designated for drawback because it is no longer in the same condition, and if merchandise was used while in the United States, it cannot be designated for drawback even if it otherwise appears to be in the same condition. While application of these conditions is usually a simple matter, there are cases where the facts expose a tension in the law's language.

There is an exception to the use prohibition of 19 U.S.C. 1313(j)(1)(B). Section 1313(j)(4) provides that "incidental operations" performed on imported merchandise will not be considered a disqualifying use of that merchandise. The provision sets forth four operations that are permitted: testing, cleaning, repacking, and inspecting. The provision states that this list of four is not exclusive. The tension arises in the following language: "The performing of incidental operations (including, but not limited to, testing, cleaning, repacking, and inspecting) * * * *that does not amount to a manufacture or production for drawback purposes* * * * shall not be treated as a use of that merchandise * * *" (Emphasis added.) The tension is this: If the above underlined language is accorded its apparent meaning, then any number of significant operations can be performed on imported merchandise, so long as the operation involved is not so extensive as to be deemed a manufacture or production. Same condition drawback, under this interpretation, would be allowed despite

the fact that the imported merchandise has been altered by the operation. If this is the meaning to be given to the use exception of 19 U.S.C. 1313(j)(4), then the same condition requirement of 19 U.S.C. 1313(j)(1)(A)(i) cannot be accorded its plain meaning, for merchandise that has been subjected to a process that would qualify under the above interpretation of the use exception would not be in the same condition as when imported.

There is conflict within the use exception provision itself. Compare the broad interpretation above - that significant operations short of a manufacturing/production process, which inevitably alter to some extent imported merchandise and thereby change its condition, are exceptions to the use prohibition—with the four operations named in the provision: testing, cleaning, repacking, and inspecting. The provision states that permissible incidental operations are not limited to these four. Yet, to formulate an idea on what other kinds of operations are permitted, a close look at these four is a legitimate place to start. Note that these four operations are not even remotely similar to many operations that would qualify under the above interpretation of the use exception. Note also that the four named operations would not produce any significant change in the imported merchandise; in most imaginable cases, no discernable changes whatever would be produced. If these named operations are to give us any reasonable clue to the kinds of operations that are permitted, as just proposed, it is immediately negated by what is suggested in the aforementioned underlined language of the use exception. In fact, what is suggested by this language flies rather directly in the face of the plain meaning, and basic concept, of same condition drawback. These inconsistencies are relevant in some situations, such as that presented in the instant case.

The question is, "In view of the fact that merchandise must be exported in the same condition as when imported, under 19 U.S.C. 1313(j)(1)(A)(i), how much of a change in condition, if any, should be tolerated when a permissible incidental operation is performed on imported merchandise?" If the above interpretation of the use exception is accepted, all manor of significant alterations in the condition of the merchandise would have to be tolerated. Alternatively, if the operations listed in the provision are accepted as reasonable guides to determine what kinds of operations are permissible, it should then be untenable to suggest that all manner of operations producing significant changes are permissible, so long as they are productive of something less than a new and different article.

We are not inclined to accept the former formulation of the use exception because it does such considerable violence to the basic notion of same condition drawback. Rather than struggle with the conflict this formulation invites, we interpret the various provisions of the same condition drawback law to be consistent with each other. Section 1313(j)(1)(A)(i) is the basic same condition requirement. Section 1313(j)(1)(B) is the basic use prohibition. These two provisions form the

essence of same condition drawback. Section 1313(j)(4) is the use exception. It is important to note that this is an exception to the use prohibition; *it is not an exception to the same condition requirement*. The four named permissible operations clearly suggest that other, unnamed such operations should have only a decidedly minor effect, if any, on the imported merchandise. In fact, it is eminently reasonable to argue that the named operations have no significant effect on imported merchandise. Therefore, any other permissible operations should be limited to those that have considerably little, if any, effect on imported merchandise; that is, only insignificant, minimal changes in condition should be tolerated. In this way, the use exception is interpreted as consistent, or in harmony, with its own guidelines, as well as with the basic same condition requirement. The language regarding operations that do not amount to a manufacture or production, to be interpreted consistently with the foregoing provisions, merely means that any operation that amounts to a manufacture or production would not qualify as an incidental operation. In this way, all provisions of the basic same condition drawback law are interpreted consistently.

In further support of this interpretation is the examination provision of the same condition drawback regulations, 19 CFR 191.141(b)(3), which subjects merchandise designated for same condition drawback to an examination by Customs prior to exportation. By contrast, there is no pre-exportation examination under manufacturing drawback. The purpose of the examination is verification: to ensure that imported merchandise is in the same condition and that it was not used while in the United States. If processes that significantly affect the condition of imported merchandise were permitted under the use exception, this pre-exportation examination provision would be impractical and probably unworkable.

In recent rulings, Customs has interpreted the same condition drawback law as a definitively contained concept, somewhere on one side of a divide that separates it from manufacturing drawback. These rulings see some operations as falling within the concept of manufacturing drawback, others falling within the parameters of same condition drawback, and still others falling in between, qualifying for neither. Thus, Customs is of the view that these two separate and distinct drawback provisions are not complementary and contiguous provisions as put forward in CSD 84-19.

In the ruling you cited, 220833, dated February 23, 1989, published as CSD 89-73, the two kinds of drawback were carefully considered and the operation in question was found to be ineligible for both - it was not productive of a new and different article, evidencing a sufficient transformation in character, nor was it an incidental operation under 19 U.S.C. 1313(j)(4). The reason it was not deemed an incidental operation is that the operation altered the condition of the imported merchandise to a sufficient extent that it could no longer be said to be in compliance with the same condition requirement of 19 U.S.C. 1313(j)(1)(A)(i). The

ruling reflects our view that while incidental operations will be allowed, and some minor, insignificant changes in condition produced thereby will be tolerated, these exceptions will be applied cautiously so as to avoid undermining the basic same condition concept.

In CSD 89-13, individual, stand-alone food processing machines were imported, certain parts were removed and adjustments made to permit the coupling of machines, and the machines were connected to form an assembly line of connected machines, each performing a different function. The ruling held that neither manufacturing nor same condition drawback was applicable. The operation did not produce a new and different article, so different in character from the imported merchandise that a sufficient transformation was evidenced. On the other hand, because of removed parts, necessary adjustments, and the consequent fact that the imported machines could no longer operate as stand-alone machines, the imported merchandise was no longer in the same condition. Similarly, in the aforementioned CSD 89-73, the merchandise in question, which had to be adjusted after importation to meet European voltage requirements, was no longer compatible with United States voltage requirements. Anytime a characteristic of imported merchandise is significantly altered, as evidenced in these rulings, the merchandise cannot be said to be in the same condition.

Based on the foregoing, we conclude that the operations in question in this case do not qualify for same condition drawback. The principle of CSD 89-73 applies to all operations that produce an alteration from one voltage capacity to another (and involving the physical changes necessary for the alteration). This applies to operations one through three set forth above. (See the operations listed on pages two through six of the drawback proposal sworn to on October 4, 1988, beginning with the voltage adjustment (to 240 volts) of receivers on page two, and ending with the CSA adjustments to receivers on page six.) Regarding the assembly operations (four and five above) - the assembly of the amplifier kits (beginning on page seven of the proposal) and the assembly of the speakers using imported woofers (page nine) - we believe that these would qualify for manufacturing/production drawback under 19 U.S.C. 1313(a).

Finally, to the extent that CSD 84-19 concludes that any operation that is not a manufacture/production for drawback qualifies as an incidental operation under 19 U.S.C. 1313(j)(4), such conclusion is hereby rescinded and replaced, as above. However, the ruling's holding remains valid: "[W]here a claimant could qualify for drawback under either 19 U.S.C. 1313(a) or (j), and the Customs region where the claim is processed believes that the claim was submitted under the incorrect provision, that office may, nevertheless, process the claim as submitted." This holding was designed to save time and resources for both the government and the public in the processing of drawback claims. Its purpose and usefulness (even if diminished) warrant its continued effect.

Holding:

1. Same condition drawback is inapplicable to the operations here involved because such operations alter the merchandise, thereby precluding compliance with the same condition requirement of 19 U.S.C. 1313(j)(1)(A)(i).

2. Manufacturing and same condition drawback are not complementary provisions. An operation that fails to qualify under the former does not, by operation of such failure, qualify under the latter. Accordingly, CSD 84-19 is clarified.

If you have any further questions, please contact this office.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–19)

This ruling addresses procedural rules governing entry bond cancellations and the timely presentation of satisfactory documentary evidence substantiating exportation (19 U.S.C. 1623, 19 CFR 10.39, 113.43(c), 113.52, 113.55, 113.55(c), 113.62(h)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., April 11, 1991.

File: HQ 221769
BON-2-CO:R:C:E 221769 JR
Category: Bonds

DISTRICT DIRECTOR OF CUSTOMS
U.S. CUSTOMS SERVICE
P. O. Box 3130
Laredo, Texas 78044-3130

Re: Request for Internal Advice; Cancellation of bond securing temporary importation; "timely" presentation of proof of exportation; Customs Directive 3200-27, dated September 29, 1988; 19 CFR 10.38; 19 CFR 10.39; 19 CFR 113.55

DEAR SIR:

This responds to your memorandum (FILE: ENF-4-02-L:F September 19, 1989) concerning temporary importation bond transactions of a licensed Customhouse broker, made on behalf of its client, a large automobile manufacturer, in your district.

Facts:

Liquidated damages were assessed against the importer for violations involving temporary importation bonds (TIBs) on injection molds for

automobiles (one per entry) that were imported into the United States for repair.

For three of the entries, see Exhibit 1, (Case Nos. 88-2301-20366, 88-2301-20373, and 88-2301-20374) the molds were exported generally within a month of their importation (well in advance of the expiration of the TIB period) and under Customs supervision (the "Report of Exportation" portions of the CF 3495s were completed by Customs on the date of the exportations); however, the broker failed to file the CF 3495s with Customs before the expiration of the TIB period in order to complete the TIB transaction. Customs issued a "Notice of Liquidated Damages Incurred and a Demand for Payment" (CF 5955A) to the broker for failure to comply with the terms of the bond under 19 CFR 10.39(d)(1). At this point, the broker filed with Customs the three CF 3495s. We note in passing that a considerable period of time passed between the expiration date of the TIBs and the submission of the CF 3495s: one CF 3495 was filed approximately eight months after expiration of the TIB and the other two CF 3495s approximately six months. Customs cancelled the claim for liquidated damages upon payment of $100.00.

For three other entries, see Exhibit 2, (Case Nos. 89-2301-20459, 89-2301-20465, and 89-2301-20466), the molds likewise were timely exported within the TIB period, but they were not exported under Customs supervision (i.e., uncompleted "Report of Exportation" portions of the CF 3495s). The broker failed to submit Mexican Customs landing certificates as proof of exportation before expiration of the TIB period. Customs issued its CF 5955As for failure of the importer to comply with the terms of the bond under 19 CFR 10.39(d)(1). The broker then filed the unexecuted CF 3495s and the landing certificates. Over a year passed between the expiration of the TIBs and the filing of the export documentation. These claims were cancelled upon the broker's payment of $100.00 in liquidated damages.

Customs assessed liquidated damages against the five TIBs listed in Exhibit 3 because the CF 3495s were not presented to Customs before exportation. From the file, we cannot ascertain whether examinations were requested for these entries.

Issues:

1. The issue is whether proof of exportation (Customs Form 3495's "Report of Exportation" or extraneous documentary evidence) must be presented to Customs at the initial port of importation prior to the expiration of the TIB period and within the bond period to be acceptable to cancel the bond charge in toto.

2. If a TIB importer files with Customs a CF 3495 as proof of exportation after the goods are exported, is the CF 3495 sufficient to prove the fact of exportation when the CF 3495 was not presented to Customs before exportation?

Law and Analysis:

Issue 1.

The responsibility of the importer under a temporary importation under bond (TIB) is to insure that exportation of the articles occurs within the TIB period and that documentary proof of exportation is timely filed with Customs. *See* Notes to Chapter 98, Subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS). The Customs Regulations (CR) governing temporary importations under bond are found in sections 10.31 through 10.41 (19 CFR 10.31-10.40), and those governing cancellation of the bonds, sections 113.51 through 113.55 (19 CFR 113.51-113.55).

The time period for the production of export documentation must not be confused with the time requirements for exportation under a TIB, which must be accomplished within the period of time the articles are permitted to be present in the Customs territory, generally one year from date of importation unless a lawful extension is granted. *See* U.S. Note 1(a) of Subchapter XIII, Chapter 98, HTSUS; Headquarters ruling letter 222706 TLS, dated March 1, 1991.

What is "timely" presentation of the proof of exportation? The broker contends that to cancel a TIB (*See* section 113.55, CR), the only requirement is that "timely proof" be presented to Customs that the goods were used in accordance with the governing duty-free provisions of law, and as that phrase "timely proof" appears in section 113.62(h), CR, it does not specifically limit or define the time as the filing of proof within the TIB period, as the Laredo office asserts.

The statute, 19 U.S.C. 1623, authorizes the Secretary of the Treasury to publish guidelines establishing standards for setting the terms and conditions for cancellation of the bonds or charges thereunder. The guidelines published in Treasury Decision (T.D.) 89-48 (54 FR 16182 April 21, 1989), in part, provide:

> "If the merchandise was exported or destroyed, but not within the bond period, or if it was exported but not under Customs supervision (if required), or if it was timely exported or destroyed *but Customs was not timely notified so as to cancel the bond:*
>
> 1. Cancel the claim for liquidated damages upon payment of an amount between 1 and 5 percent of the bond amount (depending on aggravating or mitigating factors present), but not less than $100."

(Emphasis added). The mitigation guidelines do not define the time period which the importer must notify Customs.

Likewise, the Customs Regulations do not set forth a specific time limit for the presentation of the documentary evidence for the production of any free-entry document, *see* 19 CFR 113.43(c), 19 CFR 172.22(c), 19 CFR 113.62(h)(3) and 19 CFR 10.39; *see also* 19 CFR 113.52, other than to say that if a foreign landing certificate is required by the district director to support exportation, it must be presented to Customs within 6 months from the date of exportation, *see* 19 CFR 113.55(c).

Subpart E (Production of Documents) of Part 113, CR, states that unless another time period is fixed by law or regulations, any document for the production of which a bond is given shall be delivered within 120 days from the date of notice from Customs requesting such document. *See* 19 CFR 113.42. We do not find section 113.42, CR, helpful for TIB matters inasmuch as Customs does not issue a notice to the importer before the TIB expires. At the time of importation, the importer/broker is aware that he will need to produce evidence of exportation at the close of the TIB period.

The broker's contention that no specific time limits for the cancellation of bond charges are mentioned in the statute, the mitigation guidelines, the Customs Regulations, or Customs Directive 3200-27 is correct.

In order to provide some background information on the cancellation of TIBs, a brief discussion on the subject follows. By T. D. 81-214, notice was given to the public that the cancellation procedures of TIBs were modified to allow exportations to be proven by documentary evidence only and the requirement of Customs' physical supervision of the exportation process was eliminated. The requirements of sections 10.38 and 10.39, CR, were suspended at the option of the importer. T.D. 85-40 amended the Customs Regulations, which were to become effective on April 11, 1985, by setting time limitations on the reconciliation of TIBs: proof of timely exportation was to be provided to the district director at the port of importation within (1) 60 days of exportation or (2) 20 days from the expiration of the bond or carnet period, whichever occurred first. These time constraints expressed in section 10.38, CR, were never given effect since T.D. 85-66 delayed the effective date of T.D. 85-40 indefinitely. The proposed changes to 19 CFR 10.38 and 10.39 in T.D. 85-40 were perceived to compromise enforcement efforts and, thus, were not adopted. *See* T.D. 86-91. Since that date, no other proposed changes to Part 10 of the Customs Regulations have been attempted. The requirements of examination and supervision of exportation by Customs were still in place to ensure that the articles were, in fact, exported.

It was not until the Customs Service issued Customs Directive (C. D.) 3200-27, dated December 29, 1988 (effective January 29, 1989), that instructions were given relating to the examination of merchandise entered under TIB provisions and the documentary evidence requirements. Customs Directive 3200-27 modified the procedures to allow exportation to be proven by documentary evidence and to benefit Customs by eliminating the physical examination requirement on a selective basis. The C.D. relaxed the requirement of 19 CFR 113.55(a) (1) which required all four documentary pieces of evidence to be filed as proof of exportation in order to cancel an export bond. *See* Headquarter's ruling letter 210999 MM, dated October 18, 1979. Instead, the Directive requires the submission of only what is necessary to establish

the fact and date of exportation, essentially the TIB entry (CF 3461/CF 7501 with invoices) and at least one evidentiary export document.

The following documentary evidence, such as a copy of a bill of lading or air waybill; a landing certificate; a vessel, vehicle or aircraft manifest; a certificate of lading: a certified Notice of Exportation (CF 7511); a validated Shipper's Export Declaration; a Customs certificate of destruction (CF 3499); an affidavit from the forwarder attesting to exportation of the merchandise which is exported at a border port; an "Exportation Certified" CF 3461, CF 7501 or CF 3495; or a CF 7512 - In Bond document (T&E and I.E.) can be adequate proof of exportation.

Any of the above-mentioned documentary evidence, which also contains the TIB number and sufficient information on the description of the merchandise, quantity, weight, part or style number to allow for proper matching with the TIB entry, can be submitted as proof of exportation.

C.D. 3200-27, however, did not resolve the question of what is considered "timely" submission of exportation documentation. The Directive merely references the Customs Regulations for the time requirements: "Failure to provide adequate documentation in a timely manner in accordance with the Customs Regulations shall result in a claim for liquidated damages." *See* C.D. 3200-27, Section E(3)(a), at page 6.

While we agree with the broker's assertion that "timely" presentation of proof of exportation does not require the filing of such proof *within* the TIB period, our reading of section 113.55(a)(1), CR, is that the bond should be cancelled when the export documentation is obtained upon exportation of the merchandise. We interpret section 113.55(a)(1) as allowing the export documents to be furnished to Customs within a reasonable time after exportation. Of course, in an ideal commercial setting, the export documents would be presented at the close of the TIB period, the day the TIB expires. However, as most commercial transactions involve time lags in obtaining documentation, we must determine what is considered a "reasonable" time period for the submission of proof.

A rule that proof of exportation should be submitted by the date of expiration of the bond period would be too restrictive. For example, if the exportation occurred on the last day of the bond period, under such a restrictive rule, the TIB importer would be assessed liquidated damages if proof of exportation was not readily available.

It is our opinion that, except for 19 CFR 113.55(c) (in certain situations, the district director may require the production of a foreign landing certificate within six months from the date of exportation), export documentation should be accorded the same time limits given on a Request for Information (CF 28) or on a Notice of Redelivery (CF 4647), that is, 30 days. We find that 30 days after the bond period expires is a reasonable time period for the importer/broker to provide Customs with the necessary documentary proof of exportation. Section 113.55(a)(1) implies that the export documentation should be presented as soon as it

is practicable. We recognize that if the TIB importer proves exportation through the the use of documents provided by a foreign country, (such as a foreign landing certificate) it will generally take longer than 30 days to obtain them.

On the other hand, if the documentation is available at the time of the TIB's expiration when the exportation occurred within the bond period, nothing should prevent the importer/broker from filing the documentation with the port of importation either on the bond's expiration date itself or within a reasonable time after the exportation in order to cancel the TIB. The prudent importer/broker would submit the "proof of exportation" as soon as practicable to effect a cancellation of the bond and release himself from liability on the bond.

In this case, the majority of the exportations occurred long before the expiration of the bond period, yet no proof of exportation was submitted to cancel the bond until Customs issued a demand for liquidated damages. Even though the merchandise was exported timely, the Customs field office correctly assessed liquidated damages due to the failure of the TIB importer/broker to furnish Customs with the export documentation in reasonable time. By way of illustration, the documentation for one of the TIBs was not filed until eight months after the expiration of the TIB, despite the fact that 11 months had already passed between the time when the goods were exported and the close of the TIB period. This period cannot be considered reasonable. By allowing a long period of time to pass before supplying the proof of exportation, the TIB importer subjects himself to the risk of having liquidated damages assessed against him on his open TIBs for failure to comply with the basic terms of the bond. We affirm the field's action as proper.

To summarize, for the purpose of bond reconciliation, the importer's obligation under the bond is to satisfactorily and timely submit: (1) a single summary submission of articles exported if one TIB entry covers multiple items which are exported at different times and/or locations; (2) proof of export examination or waiver of examination (notated CF 3495 when an exportation was designated by the port of importation), and (3) documentary evidence which substantiates exportation and/or destruction. Proof of exportation must be provided to Customs within a reasonable time after the expiration of the bond period in order to cancel the TIB and avoid an assessment of liquidated damages for breach of the bond.

Issue 2.

An "Application for Exportation of Articles Under Special Bond," Customs Form 3495, is only required when the TIB merchandise has been designated for export examination by the port of entry/importation. If circumstances warrant examination, the importer/broker is required to file the CF 3495 and the TIB (CF 3461/CF 7501, with invoices) with the district director at the port of exportation in a sufficient length of time prior to the date of exportation to permit Customs to examine

and identify the articles. 19 CFR 10.38. Some field offices require a prefiling of CF 3495 at least 2 days in advance of exportation.

When an examination is required, a CF 3495 which is completed by the Customs officer establishes the fact of examination. Although the Customs officer is responsible to sign (initial) and date the "Report of Examination" portion of the CF 3495, the importer has the responsibility of completing the form accurately with the other pertinent information before presenting it to Customs. Although the CF 3495 must be presented to Customs before the exportation of the TIB merchandise, the CF 3495 may be filed at the port of importation within a reasonable time after the TIB period expires in order to reconcile the bond.

A CF 3495, which is not completely executed by Customs and the importer, will not be sufficient to cancel the TIB unless it is presented with other satisfactory documentary proof of exportation. A CF 3495 will be sufficient to establish proof of exportation only if it is fully and accurately completed by both the TIB importer/broker and Customs, and submitted with the TIB entry to Customs either at the close of the TIB period or within 30 days from the expiration of the bond.

Lastly, we agree with the Laredo district that a Customs field office is not limited by C.D. 3200-27 as to what merchandise they can designate for examination. The Customs Directive provides guidelines, it does *not* restrict the field office to a certain category of merchandise. Customs by law has authority to examine *any* merchandise prior to exportation. *See* 19 CFR 18.7; 19 U.S.C. 1499.

Holdings:

1. In order for Customs to cancel the TIB and for the importer to avoid an assessment of liquidated damages, satisfactory documentary evidence of exportation (and/or destruction) as "proof of exportation," must be provided to the port of importation at the TIB's expiration date, if possible, or within a reasonable time period thereafter, *i.e.*, 30 days.

If exportation occurs well-within the TIB period, the TIB importer/broker may submit documentary evidence which substantiates exportation any time prior to the date the TIB expires; this will effect a cancellation of the bond and relieve the TIB importer from liability.

2. When a CF 3495 is not presented to Customs before exportation, the incomplete CF 3495 is insufficient to prove exportation. Liquidated damages would properly be assessed.

A copy of this decision may be forwarded to the inquirer.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91–20)

This ruling interprets the interest provisions of the antidumping duty law and holds that the term "determination" applies to the final antidumping duty order (19 U.S.C. 1677g, 26 U.S.C. 6621 and 26 U.S.C. 6622).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., May 3, 1991.

File: HQ 221698
LIQ-4-01/LIQ-11-CO:R:C:E 221698 JR
Category: Entry/Liquidation

REGIONAL DIRECTOR OF CUSTOMS
COMMERCIAL OPERATIONS DIVISION
PACIFIC REGION
One World Trade Center, Suite 534
Long Beach, CA 90831-0700

Re: Application for further review of Protest No. 2704-5-003921; antidumping duty order concerning sorbitol crystalline from France; 19 U.S.C. 1677g

DEAR MADAME:

The above-referenced protest was forwarded to this office for further review. We have considered the issues raised and our decision follows.

Facts:

The International Trade Commission (ITC) issued its final affirmative antidumping determination on March 29, 1982, that an industry in the United States is being materially injured by reason of imports of sorbitol from France. *See* 47 FR 14981, April 7, 1982. On April 9, 1982, the International Trade Administration (ITA) issued its final antidumping order stating that sales of sorbitol from France were less than the fair value. *See* 47 FR 15391-15392, April 9, 1982. The ITA ordered that all unappraised entries of this merchandise made on or after November 30, 1981 - the date from which final assessment of duty has been suspended - will be liable for the possible assessment of antidumping duties and a deposit of antidumping duties must be made on all such entries made on or after April 9, 1982.

This protest involves an entry made on an importation of French sorbitol crystalline at the port of Los Angeles on May 3, 1982, with a deposit of both estimated tariff and antidumping duties in accordance with the final order of the ITA. The entry was liquidated on June 14, 1985, with the refund of antidumping duties, after the liquidation of the entry had been suspended. On July 30, 1985, the importer timely filed a protest under 19 U.S.C. 1514(a) against Customs' nonpayment of interest on the refund of its overpayment of antidumping duties.

The importer/protestant contends that it is entitled to interest on the refund of antidumping duties received on each individual entry entered

into the United States after the final antidumping duty order of April 9, 1982, pursuant to Section 621 of the Trade and Tariff Act of 1984 (codified at 19 U.S.C. 1677g). The protestant argues that the special liquidation notes to CIE's Supplement CIE-N-63/81, Supplement No. 2, issued on November 19, 1984, redesignated Supplement No. 3 on January 1, 1985, provides for interest on refunds of dumping duties deposited after April 9, 1982. Alternatively, interest should be refunded at a rate of 11% compounded daily from the date of entry to the date of liquidation.

The district office's position is that Section 621 of the Tariff and Trade Act (19 U.S.C. 1677g) is effective only for "determinations" made on or after October 30, 1984, regardless of the date of entry. The district office believes that the payment of interest on overpayments or underpayments under 19 U.S.C. 1677g is inapplicable to the entry in question since the signature on the Final Results of the Administrative Review of the Antidumping Duty Order is March 12, 1984 (*see* 49 FR 10695, dated March 22, 1984), which is before the listed effective date of 19 U.S.C. 1677g (October 30, 1984). Alternatively, the district asserts that the Tax Equity and Fiscal Responsibility Act of 1982 does not provide for the compounding of interest on antidumping or countervailing duties, but rather like interest paid on such refunds based on judgments or agreements with the Court of International Trade, should be computed on a simple basis.

Issue:

Whether interest is payable on the refund of an overpayment of estimated antidumping duties deposited prior to the amendment of 19 U.S.C. 1677g? If so, what rate of interest applies?

Law and Analysis:

Prior to the enactment of the Trade Agreements Act of 1979, interest on underpayments or overpayments was not required by law. However, Section 778 of the Trade Agreements Act of 1979 (19 U.S.C. 1677g (1979) (hereafter "1979 Act"), provided that interest is payable on any overpayments or underpayments of estimated duties deposited on merchandise entered, or withdrawn from warehouse, for consumption on and after the publication of the final affirmative injury determination by the International Trade Commission. The 1979 Act set the interest rate at 8 percent per annum, or if higher, the rate in effect under section 6621 of title 26 on the date on which the rate or amount of the duty is finally determined. The interest was simple interest and was to be determined at the rate in effect on the date of final determination.

Section 778 was subsequently amended by section 621 of the Trade and Tariff Act of 1984 (hereafter "1984 amendment") to provide that interest shall be payable on the amounts deposited on merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of a countervailing duty or antidumping duty order. The 1984 amendment provides that interest was generally payable at the rate in effect under 26 U.S.C. 6621. By virtue of section 6622 of title

26, interest calculated under section 6621 must be compounded. Thus, this amendment provided that interest be compounded and payable at the IRS rate for any period of time during which the entries were suspended. Pursuant to this method the interest payable would vary in accordance with the interest set forth under section 6621 for the periods of suspension. This amendment became effective on October 30, 1984.

In 1986, Congress clarified the effective date of the 1984 amendment by indicating that the 1984 amendment should apply to all entries unliquidated on or after November 4, 1984. Section 1886(b) of the Tax Reform Act of 1986, Pub. L. No. 99-514. The Court of International Trade in *Canadian Fur Trappers Corp. v. United States*, 691 F. Supp. 364 (CIT 1988), *aff'd*, 884,F.2d 563 (Fed. Cir. 1989) held that "the 1984 amendment cannot be applied for interest accruing before the effective date of that amendment." *Canadian Fur Trappers* involved entries made before the 1984 amendment, liquidated after October 30, 1984, but before the 1986 amendment indicating that they should be liquidated in accordance with the 1984 amendment. Thus, pursuant to the amendment, the entry in this case was made before this amendment but was liquidated after the Act became effective. Therefore, the entry should be liquidated in accordance with the 1984 amendment, since the law in effect at the time the entry is liquidated shall control. *See* CIT Order, dated August 25, 1988, *Canadian Fur Trappers Corp. v. United States*, Consolidated Court No. 86-07-00977 (86-05-00641).

We disagree with the district's finding that 19 U.S.C. 1677g, as amended in 1984, does not control the entry. At the time of entry on May 3, 1982, there was a final antidumping duty order by Commerce effective April 9, 1982. In our view interest would properly be assessed as of the date of entry rather than March 12, 1984, the date of the Final Results of the Administrative Review, as the district office asserts. We reject the protestant's argument that interest should be compounded from the date of entry to the date of liquidation. A combination of interest calculation appears to be the appropriate course of action in this case. It is our position that the entry would be subject to interest in accordance with the 1984 amendment, i.e., compound interest at the varying IRS rates on or after November 4, 1984, *see* 26 U.S.C. 6621, *and* the 1979 simple interest provision is applicable for interest accruing prior to the effective date of the 1984 Act from the date of entry.

Holding:

Interest is payable on the refund of an overpayment of estimated antidumping duties deposited prior to the amendment of 19 U.S.C. 1677g, that is, first at the rate of simple interest in accordance with the 1979 Act from the date of entry (May 3, 1982) until November 4, 1984, the effective date of the 1984 amendment, and subsequently, at the compounding rate of interest set forth in the 1984 amendment until the date of liquidation (June 14, 1985).

You are directed to allow the protest in part, as provided in the decision. A copy of this decision may be provided to the protestant.

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-21)

This ruling holds that the American Society for Testing Materials (ASTM) standard specifications for aviation turbine fuels are useful guidelines in determining the fungibility of such fuels for purposes of substitution same condition drawback (19 U.S.C. 1313(j)(2)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., May 10, 1991.

File: HQ 221911
DRA-4-CO:R:C:E: 221911
Category: Drawback

REGIONAL DIRECTOR
COMMERCIAL OPERATIONS
PACIFIC REGION
One World Trade Center
Long Beach, California 90831-0700

Re: Fungibility of jet aviation turbine fuels for purposes of substitution same condition drawback (19 U.S.C. 1313(j)(2)).

Facts:

Specifications were submitted for imported designated and substituted jet aviation turbine fuels which meet the standard specifications of the American Society for Testing Materials (ASTM).

Issue:

The issue is whether the standard specifications for aviation turbine fuels of the ASTM are useful guidelines to determine the fungibility of those fuels for purposes of the substitution same condition drawback (19 U.S.C. 1313(j)(2)). Our response is in the affirmative.

Law and Analysis:

One of the requirements under the substitution same condition drawback law (19 U.S.C.1313(j)(2)) is that the merchandise substituted for exportation must be fungible with the duty-paid merchandise and in the same condition as was the imported merchandise at the time of its exportation. Section 191.2(1) of the Customs Regulations defines the term "fungible merchandise" as merchandise which for commercial purposes

is identical and interchangeable in all situations." We are satisfied that the ASTM standards for aviation turbine fuels are useful guidelines to determine if two shipments meet the requirements of the law and regulations for fungibility.

Holding:

Two shipments of aviation turbine fuels that meet the Standard Specifications for Aviation Turbine Fuels, Designation D 1655 of the ASTM (i.e., Jet A for Jet A, Jet A-1 For Jet A-1 or Jet B for Jet B, see Table 1 of the standards, Detailed Requirements of Aviation Turbine Fuels) are fungible for purposes of the substitution same condition drawback law, 19 U.S.C. 1313(j)(2).

JOHN DURANT,
Director,
Commercial Rulings Division.

(C.S.D. 91-22)

This ruling defines the term "liquidated" as meaning the posting of the bulletin notice of liquidation in the appropriate customhouse as set forth in 19 C.F.R. 159.9(c). The term "liquidated" and its application in the new amendments to section 1466 herewith defined (Public Law 101-382), 19 U.S.C. 1466(a) and 19 U.S.C. 1466(h)).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., May 16, 1991.

File: HQ 111513
VES-13-18-CO:I:T:C 111513 RAH
Category: Carriers

DEPUTY ASSISTANT REGIONAL COMMISSIONER
COMMERCIAL OPERATIONS DIVISION
423 Canal Street
P.O. Box 2450
New Orleans, LA 70130

Re: Vessel Repair; 19 U.S.C. § 1466; *Lash* barge; Liquidation

DEAR SIR:

This is in response to your transmittal of February 7, 1991, regarding protest number 1402-90-000004.

Facts:

The record reflects that entry numbers 02-0015398-2 (9-29-89), 02-0019324-4 (12-19-89), 02-0019363-2 (2-2-90), 02-0019396-2 (2-28-90), 02-0020055-1 (3-20-90), 02-0020057-7 (4-10-90) and 02-0020109-7 (5-16-90), were filed reflecting foreign made repairs to

barges. No application for relief was filed for the entries and they were liquidated on August 17, 1990, except for 02-0015398-2, which was liquidated on July 27, 1990.

The subject of this ruling is protest number 1402-90-000004 filed October 22, 1990, in which the protestant claims that duty on foreign repairs, expenses, or equipment on LASH barges on the ground that Section 484E of Public Law 101-382 excludes LASH barges from duty under 19 U.S.C. § 1466. The protestant claims that the legislative history (comments of Senator Breaux in the Congressional Record dated April 20, 1990) indicates that the bill is applicable to all entries "still the subject of administrative proceeding before the Customs Service," which includes all matters subject to a timely protest.

You specifically request our advice on the whether the term "liquidated" means the posting of the bulletin notice of liquidation in the appropriate customhouse.

Issue:

Whether the term "liquidated" in Public Law 101-382 includes all entries still the subject of administrative proceedings before the Customs Service, i.e. all matters subject to a timely protest.

Law and Analysis:

Title 19, United States Code, section 1466(a), provides in pertinent part for payment of duty in the amount of 50 percent ad valorem on the cost of foreign repairs to vessels documented under the laws of the United States to engage in the foreign or coastwise trade, or vessels intended to be employed in such trade.

On August 20, 1990, the President signed into law the Customs and Trade Act of 1990 (Pub. L. 101-382), section 484E of which amends the vessel repair statute by adding a new subsection (h), which provides in part:

(h) The duty imposed by subsection (a) of this section shall not apply to—

> (1) the cost of any equipment, or any part of equipment, purchased for, or the repair parts or materials to be used, or the expense of repairs made in a foreign country with respect to, LASH (Lighter Aboard Ship) barges documented under the law of the United States and utilized as cargo containers.

It is clear that the statutory exemption does not apply to all *Lash* barges, but rather only to those which are documented under U.S. laws and are utilized as cargo containers. Further, the benefits of the statute are not made applicable to *Lash* barges which are undocumented. Neither should benefits extend to *Lash* barges which were not in continual cargo container service (e.g., such service may have been suspended or terminated) between the time of the last pre-repair departure from the U.S., and first subsequent U.S. arrival.

The effective date of the amendment is stated as follows:

> Effective date.—The amendment made by this section shall apply to—
> (1) *any* entry made before the date of enactment of this Act that is not *liquidated* on the date of enactment of this Act, and
> (2) any entry made—
>
> > (A) on or after the date of enactment of this Act, and
> > (B) on or before December 31, 1992.

(Emphasis added).

We agree with you that the term "liquidated" means the posting of the bulletin notice in the appropriate customhouse, as set forth in 19 C.F.R. § 159.9(c). Nevertheless, we recognize a distinction between when an entry is "liquidated" and when such liquidation is ultimately effective. For example, we recently ruled on the retroactive impact of 19 U.S.C. 1466 (h) on pending Customs cases involving entries made before the August 20, 1990, date of enactment. See, Customs Ruling Letter 111474 GV. Specifically, we held that the term "liquidated" as used in 19 U.S.C. 1466 (h) is intended to mean "finally liquidated" and an entry is not "finally liquidated" if it is still the subject of administrative or judicial proceedings. Section 514 (a) of the Tariff Act of 1930 (19 U.S.C. 1514 (a)) provides, in part, that the liquidation of an entry shall be final unless a protest is timely filed, or if a court action is filed to contest denial of a protest; and *Hambro Automotive Corp. v. United States*, 603 F.2d 850, 853 (CCPA, 1979); *United States v. Desiree Intern USA Ltd.*, 497 F.Supp. 264, 265 (D.C. N.Y., 1980); and *Computime, Inc. v. United States*, 622 F.Supp. 1083 (CIT 1985).

Upon further review of this matter it is clear that the new amendments to section 1466 " * * * are intended to apply to any entry made prior to the date of enactment of [this Act] which is not finally liquidated when the bill becomes law." Accordingly, for purposes of the retroactive impact of new section 1466 (h) the benefits of said legislation will inure to those entries which were not finally liquidated (i.e., for which a timely application, petition, protest or court action was initiated) on or before August 20, 1990. As protest number 2002-90-001724 was timely filed on October 22, 1990, we find that the entries in question are subject to the benefits of the new law.

If you have any further questions regarding this matter, please do not hesitate to contact our office.

B. JAMES FRITZ,
Chief,
Carrier Rulings Branch.

(C.S.D. 91-23)

This ruling concerns the proper country of origin marking requirements for certain leather watch straps and their retail packaging (19 U.S.C. 1304).

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., June 3, 1991.

File: 733965
MAR-2-05 CO:R:C:V 733965 GRV
Category: Marking

JOHN P. DONOHUE, ESQ.
DONOHUE AND DONOHUE
Fifth Floor, The Bank Building
421 Chestnut Street
Philadelphia, PA 19106

Re: Country of origin marking of leather watch straps. 19 CFR 134.11; article marking; primary method of marking article (hot foil in contrasting colors and cold stamping in same color); conspicuousness; 19 CFR 134.41; repacked articles; container marking; 19 CFR 134.34; 19 CFR 134.32(d): secondary marking; 19 CFR 134.26; degree of visibility/legibility (print size and type); typography

DEAR MR. DONOHUE:

This is in response to your letters of November 25, 1990, and March 8, 1991, on behalf of Regal Industries, requesting a country of origin marking ruling regarding certain leather watch straps. Samples of leather watch straps were submitted for examination.

Facts:

Prior to July of 1989, Regal imported leather watch straps from Hong Kong, China and Thailand, as follows: leather watch straps, each cold stamped on its back with its country of origin, were bulk shipped in crates to the U.S. (You indicate that cold stamping is a post-manufacturing method of marking that leaves a non-inked impression on the article in the same color as the article itself). After entry, the merchandise was variously distributed: approximately 95% of the watch straps were individually packaged for retail sale, and the remaining 5% were sold to watch repairers without being packaged. The watch straps that were individually packaged were placed on felt paper backing material and encased in a clear plastic container. Because the initial, cold stamp marking was obscured by this packaging method, the country of origin was secondarily denoted on a small paper label – measuring approximately one by one and half inches – that was placed on the inside front of the plastic container. This paper label contained other product/consumer information, all of which was printed in larger print sizes and heavier print types than the country of origin marking was printed in: the brand name of the merchandise is printed in approximately 8-point

(a point is a unit of type measurement equal to 0.01384 inch or nearly 1/72 in., and all type sizes are multiples of this unit), bold print and the retail price of the watch strap is printed in approximately 13-point, bold print, whereas the country of origin marking is printed in 3-point, light print, which is hard to read. (For an understanding of the print size/type terms referenced here, see the entry under "Type (printing)" in volume 18 of *McGraw-Hill Encyclopedia of Science & Technology* (6th ed., 1987), or the entry under "Printing" (in pre-1985) or "Printing, Topography and Photoengraving" (printings since 1985) in volume 14 of *The New Encyclopedia Britannica* (15th ed., 1975)).

Starting in July of 1989, Customs officers informed you that the merchandise was not legally marked and marking notices were issued. You state that the Customs officers required Regal to adopt the following marking scheme; (1) hot foil stamp the watch straps, which marks the merchandise in contrasting colors; (2) place gummed labels on the back of all watch straps; and, (3) enlarge the size of the country of origin designation on the paper labels in the clear plastic containers. You believe that some of these marking instructions are onerous and request that we rule on the following proposed marking method(s) for future entries: (1) exempting those imported watch straps which will be repackaged in clear plastic containers with a paper label indicating the country of origin of the particular watch strap; and, (2) exempting those imported watch straps which will not be packaged, but will be sold to watch repairers and have adhesive labels in contrasting colors affixed to the back surface of the watch straps; or (3) approving the pre-1989 marking program of cold stamping the country of origin on the backs of all the imported watch straps.

Customs import specialists have indicated that the reasons for the marking changes were two-fold. First, it was believed that the initial cold stamp method of marking the country of origin on the imported leather watch straps and the printing of the country of origin on the paper label for the packaged watch straps in the smallest print size and lightest print type employed to print the various consumer/product information on the paper label presented legibility/visibility and conspicuousness problems for the ultimate purchaser. Second, because the imported watch straps were variously distributed—to watch repairers without packages (5%) and to stores in individual retail packages (95%), and Customs was unable to determine which 5% of the imported watch straps would not be packaged for retail sale, a back up or secondary marking of all the watch straps was deemed appropriate. Thus, to ensure that all watch straps were adequately marked regardless of which market—packaged or not—your client chooses to distribute the watch straps in, the marking changes were prescribed.

Regal has instituted some of the marking changes proscribed so that the leather watch straps are currently imported with their respective country of origins hot foil marked (also a post-manufacturing method of marking, however, one which leaves the article marked in contrasting

colors) on their backs at the tip of the overlaying strap. However, while the country of origin marking on the leather strap sample submitted—printed in approximately 6-point type—is highly visible and enables the consumer to read it without strain when seen, its location—at the tip of the overlaying strap—renders its conspicuousness less than easy to find, as the underlying strap obscures the tip of the overlaying strap when a consumer turns the strap over to view the marking. The print size and type employed to denote the country of origin marking on the paper labels has not been changed; it is still printed in the smallest print size and lightest print type on the label.

Issues:

I. Regarding the initial country of origin marking of all the bulk shipped leather watch strap articles, whether the hot foil method of marking each leather watch strap on its back in contrasting colors at the tip of the overlaying strap comply with the marking requirements of 19 U.S.C. 1304.

II. Regarding the secondary country of origin marking of the repackaged leather watch strap articless, whether the print size and type employed on the paper label to denote the country of origin of the retail-packaged leather straps is sufficient to meet the conspicuous and legibility requirements of 19 U.S.C. 1304.

Law and Analysis:

The marking statute, section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin (or its container) imported into the U.S. shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or its container) will permit in such a manner as to indicate to the ultimate purchaser the English name of the country of origin of the article. Part 134, Customs Regulations (19 CFR Part 134), implements the country of origin marking requirements and exceptions of 19 U.S.C. 1304.

The primary purpose of the country of origin marking statute is to "mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 CCPA 297, 302, C.A.D. 104 (1940). The clear language of section 1304 requires 'conspicuous' marking, and to this end section 134.41, Customs Regulations (19 CFR 134.41), further provides, in part, that the ultimate purchaser in the U.S. must be able to find the marking easily and read it without strain.

Regarding the initial country of origin marking of all the leather watch straps:

Concerning the condition of the bulk shipped leather watch straps at their time of importation, based on an examination of the sample leather watch strap submitted, we find that the hot foil stamping method of marking the leather straps is legible in that the resulting

contrasting colors are easy to read, once they are located. However, we do not find that the location of the marking – on the tip of the overlaying strap of the buckled watch strap, is conspicuous, as the ultimate purchaser cannot merely turn the watch strap over to locate the marking. Rather the ultimate purchaser must unbuckle the watch strap to find the country of origin marking in the first instance. Accordingly, the leather watch straps are not deemed to be marked in a manner that fully meets the marking requirements of 19 U.S.C. 1304, in that the location of the country of origin marking is not easy to find. However, if the location of the hot foil marking is moved to some other part of the watch strap backs, away from where the straps overlay each other as a result of being buckled together, then the merchandise would be marked in compliance with the marking requirements of 19 U.S.C. 1304.

As the initial, hot foil marking scheme, modified as to its location on the leather strap as indicated above, is sufficient to meet the "conspicuous" and "legibility" requirements of the marking statute, the need to affix gummed labels on the backs of all the watch straps is obviated. Accordingly, we do not address your second and third marking proposals – calling for exempting those imported watch straps which will not be packaged because they will have adhesive labels affixed to the back surfaces and approving the pre-1989 marking program, as these marking proposals were instituted over concerns regarding the conspicuousness of the cold stamp marking, which have now been addressed.

Regarding the secondary country of origin marking of the repackaged leather watch straps:

Concerning certain articles that are repacked after importation, section 134.34, Customs Regulations (19 CFR 134.34), provides, in part, that:

> [a]n exception under section 134.32(d) may be authorized in the *discretion of the district director* for imported articles which are to be repackaged after release from Customs custody under the following conditions:
>
> (1) The containers in which the articles are repacked will indicate the origin of the articles to an ultimate purchaser in the United States.
>
> (2) The importer arranges for supervision of the marking of the containers by Customs officers at the importer's expense or secures such verification, as may be necessary, by certification and the submission of a sample or otherwise, of the marking prior to the liquidation of the entry. (Emphasis supplied).

This exception to the marking requirements, however, is available only to merchandise which will be repacked after importation into containers which will be marked to reasonably indicate the origin of the articles to the ultimate purchasers. 19 CFR 134.32. Because the merchandise in this case will not be uniformly repacked – some (5%) will be sold without being packed, this exception cannot apply to those watch straps which will not be repacked into marked containers and they must be legally

marked at the time of importation. Further, this marking exception is applicable to those watch straps which will be repacked into marked containers *only if* they can be identified and segregated from those which will not be repacked at the time of importation. It does not appear that this condition is met in the present case. Thus, concerning your first proposed marking scheme to exempt those imported watch straps which will be repacked after importation, you must present this marking proposal to the district director of the port of importation for his/her approval.

Regardless of the applicability of section 134.34, section 134.26, Customs Regulations (19 CFR 134.26), also relates to imported articles that are repacked or manipulated, and similarly provides, in part, that:

> [i]f an article subject to these requirements is intended to be repacked in retail containers (*e.g.*, blister packs) after its release from Customs custody, or if the district director having custody of the article, has reason to believe such articles will be repacked after its release, the importer shall certify to the district director that: (1) [i]f the importer does the repacking, he shall not obscure or conceal the country of origin marking appearing on the article, or else the new container shall be marked to indicate the country of origin of the article in accordance with the requirements of this part; * * *.

Thus, regarding those leather watch straps that will be repacked, assurances must be given to the district director, in the form of the written certification statement provided for at section 134.26, that the country of origin marking will not be obscured or concealed by the repackaging operation.

Lastly, we address the issue of whether the country of origin marking on the paper label of the retail-packaged watch straps is sufficient to meet the conspicuousness requirement of 19 U.S.C. 1304. Initially, we note that the concept of conspicuousness embraces two concerns: (1) visibility, which addresses the requirement that the marking must be able to be found easily, and (2) legibility, which addresses the requirement that the marking must be able to be read without strain. We also note that, in general, information presented in a bold print type and/or a large print size tends to draw the ultimate purchaser's attention away from other information that is presented in a lighter-face type and/or a smaller print size. Lastly, we note that the country of origin marking should be presented in format that is conspicuous: made readily apparent, so that, at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.

In this case, given that various print sizes and types are employed to denote various information on the paper label and that the country of origin marking is presented in the lightest-face print type and that the size of the marking is very small (3-point type), we find that the country of origin marking is not easy to read and that it does not comply with the marking requirements of 19 U.S.C. 1304 and 19 CFR 134.41(b). We

suggest that the print size of the country of origin marking on the paper label be enlarged to at least a 5-point type and that it be in sufficient bold print so that it is easy to read.

Holding:

Based on the information presented and after viewing the samples submitted, the bulk shipped leather watch straps that are initially hot foil marked with their respective country of origins on the back of the over laying strap at the tip are not properly marked for purposes of the marking statute, because the marking is not in a conspicuous (easy to find) location. Although the marking is legible, the location of the marking must be moved away from the tip of the buckled strap so that it is readily apparent to the ultimate purchaser.

The repacked watch straps that have their respective country of origins secondarily denoted in 3-point, light-face print type on paper labels that are inserted into the clear containers do not satisfy the requirements of 19 U.S.C. 1304 and 19 CFR 134.41(b).

Concerning the issue of whether the imported leather watch straps may be exempt from the marking requirements under section 134.34, Customs Regulations (19 CFR 134.34), because some (95%) will be repacked, the district director of the port where the merchandise will be imported has the discretion to authorize this marking exception. If you believe the transaction qualifies for this article exemption, you must present this marking proposal to the district director for his/her consideration.

JOHN DURANT,
Director,
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 118

PROPOSED CUSTOMS REGULATIONS AMENDMENTS CONCERNING CENTRALIZED EXAMINATION STATIONS

AGENCY: Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to add a new Part to the Customs Regulations to set forth the regulatory framework for the establishment, operation and termination of Centralized Examination Stations (CES's). CES's are privately operated facilities at which imported merchandise is made available to Customs inspectors for physical examination. In recent years, the proliferation of examination sites scattered throughout a port has resulted in inspectors incurring a high level of nonproductive travel time. The CES program allows Customs to better use its inspectional resources and clear higher volumes of cargo.

DATE: Comments must be received on or before September 23, 1991.

ADDRESS: Comments (preferably in triplicate) should be addressed to and may be inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Room 2119, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Leo Morris or Patricia Duffy, Office of Inspection and Control, 202-566-8151.

SUPPLEMENTARY INFORMATION:

Background

In recent years there has been a rapid increase in the number of Container Freight Stations (CFS), bonded warehouses, truck and rail terminals, and other indirect carriers receiving freight. The examination of this cargo has presented many logistical and staffing problems for Customs. Often these examinations sites are widely scattered throughout a port. This causes inspectors to incur a high level of non-productive travel time in order to perform regulatory compliance, classification,

and valuation examinations such as securing samples, or verifying country of origin markings.

Among the many actions Customs has taken to cope with its increased work load is the development of the Centralized Examination Station program. Centralized Examination Stations (CES's) are privately operated facilities at which imported merchandise is made available to Customs inspectors for physical examination. By having as few work sites as possible Customs is able to perform more intensive examinations with better use of inspectional resources in a better work environment. Among other benefits of CES's are improved inspectional supervision, more thorough and effective examinations and guaranteed service. The CES program allows Customs to clear higher volumes of cargo with fewer resources.

There are approximately 140 CES's operating nationwide. These facilities are operated by a variety of entities including container freight station operators, transportation companies and terminal operators. Customs considers the program successful and plans to continue it. Feedback from segments of the importing community such as brokers, importers, trucking firms, shipping lines and airlines indicates overall acceptance of CES's. Many of these entities have communicated to Customs their opinions that CES's improve the examination process, provide fair service at a reasonable cost, are responsive to importer's needs and have adequate facilities that are conveniently located. Customs is interested in further comments on the degree to which CES's respond to the needs of the importing public and any specific comments for improvement.

Existing CES's have been operating under guidelines promulgated in Customs Directives, the most recent being Customs Directive 3270-05, issued August 31, 1990. In order to fully comply with the Administrative Procedure Act, Customs proposes to amend the Customs Regulations to incorporate the CES program. Existing CES's may continue business during consideration of the proposals. Upon adoption of final rules, district directors will permit CES's operating under agreements that contain a clause setting forth the duration of the operation to continue operating for the remainder of that time, subject to continued adherence to all other terms of the agreement as well. Operators that opened a CES with a commitment from Customs that they would be allowed to continue business for a specified period of time deserve to have that commitment honored. At the expiration of the agreement, the district director will use the procedures set forth in the regulations to select future CES operators.

CES's currently operating under an agreement without a time period specified will be permitted to operate after adoption of final rules only until the district director selects an operator under the regulations. Operators that commenced business without a specified time period will be eligible to submit applications under the regulations as finally adopted.

DISCUSSION OF PROPOSALS

The regulations concerning the establishment, operation, and possible termination of CES's are being placed in new Part 118.

Subpart A contains general provisions concerning CES's. Beginning with the definition of a CES, it further states that a CES may be established only when a district director determines the need for a port or area under his jurisdiction to have such a facility. His determination is announced by written bulletin posted at the customhouse. That announcement begins a 60-day period during which applications to operate a CES will be accepted. Applications must be in writing and must be submitted to the district director that made the announcement.

The subpart continues with the responsibilities a CES operator must assume beginning with signing a written agreement with Customs in order to commence operations. The agreement will establish the length of time the CES will be allowed to operate. It is proposed that this period be from three to five years. Customs believes this period long enough to make operators willing to invest the necessary money and resources to open a CES, but not so long as to remove the need to stay responsive to the market place in contemplation of the next selection process. However, comments on different time periods will be considered. The agreement also sets forth the conditions under which the operator agrees to carry on business. In some particulars, the conditions in the agreement will be repetitions of the responsibilities of an operator set forth in the regulations. Also, due to the fact that the final selection and execution of an agreement is contingent upon the fitness of the facility to be operated as the CES, the applicant's experience in handling international cargo, as well as a background investigation of the applicant, the agreements are not transferable. If an operator chooses to terminate operation of a CES before expiration of his agreement, Customs will, assuming the location still requires a CES, choose a new operator pursuant to the regulations.

Subpart B concerns the application process. One regulation spells out a list of particulars that must be described in the application, such as the name of the principals or corporate officers that will be responsible for operation of the CES and the security features of the site that will be the CES. The district director is responsible for reviewing the applications and selecting the one or more applicants that will be allowed to operate a CES.

Subpart C concerns the movement of merchandise to a CES. Customs primary concern is that the party liable for each part of a transportation be readily identifiable. Transportation of merchandise to a CES does not involve any new type of movement; the traditional methods of an importer moving his own goods or employing some variety of bonded mover are present in the CES situation. The subpart identifies the forms usable to request permission to move merchandise to a CES. Various scenarios of movement of merchandise are listed with the assignment of liability described as well. The subpart also includes the district

director's authority to direct that a certain type of movement be used to transport merchandise to a certain CES if he has reason to so direct, *e.g.*, the need to deliver the merchandise to a Contraband Enforcement Team (CET) for intensive examination.

Subpart D concerns the revocation of an operator's selection and cancellation of the agreement to operate a CES. Causes to take such an action are separated into those causing immediate revocation and cancellation and those resulting in proposed revocation and cancellation. The district director having jurisdiction over the operator begins the process by written notice to the operator. The operator may appeal the district director's action by written notice to the Regional Commissioner having jurisdiction over the district involved, and if necessary, the Regional Commissioner's decision may be appealed to the Commissioner.

Comments

Before adopting these proposals, consideration will be given to any written comments timely submitted to Customs. Along with general comments concerning CES's, Customs invites comments concerning the costs and benefits of CES's. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) it is certified that, if adopted, the proposed amendments will not have a significant impact on a substantial number of small entities. Accordingly, they are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was John E. Doyle, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Management Reduction Act of 1980 (44 U.S.C. 3540(h)). Comments on the collection of information should be sent to the Office of Management and

Budget, Paperwork Reduction Project (1515-), Washington, D.C. 20503, with copies to the U.S. Customs Service at the address previously specified.

The collection of information in these proposed regulations is in § 118.11 (19 CFR 118.11). The information is necessary to enable a district director to choose the best qualified applicant or applicants to operate a CES.

Estimated total annual reporting and/or recordkeeping burden: 600 hours.

Estimated average annual burden per respondent and/or recordkeeper: 2 hours.

Estimated number of respondents and/or recordkeepers: 300.

Estimated annual frequency of responses: 1.

List of Subjects

Customs duties and inspection, Imports, Exports, Centralized Examination Stations.

Proposed Amendments

It is proposed to amend Chapter I of Title 19, Code of Federal Regulations (19 CFR Chapter I), by adding a Part 118 to read as follows:

PART 118—CENTRALIZED EXAMINATION STATIONS

Sec.
118.0 Scope.

SUBPART A—GENERAL PROVISIONS

Sec.
118.1 Definition.
118.2 Establishment of Centralized Examination Stations.
118.3 Written agreement.
118.4 Responsibilities of a Centralized Examination Station operator.

SUBPART B—APPLICATION TO ESTABLISH A CENTRALIZED EXAMINATION STATION

Sec.
118.11 Contents of application.
118.12 Review of application.
118.13 Notification of selection or nonselection.

SUBPART C—TRANSFER OF MERCHANDISE

Sec.
118.21 Permission to transfer cargo to CES for examination.
118.22 Assumption of liability during transfer.
118.23 Annual blanket transfer.
118.24 Designation of bonded movement and CES to be used.

SUBPART D—TERMINATION OF CENTRALIZED EXAMINATION STATIONS

Sec.
118.31 Revocation of selection and cancellation of agreement to operate a Centralized Examination Station.
118.32 Notice of revocation and cancellation.
118.33 Appeal procedure.
118.34 Review of the Regional Commissioner's decision.

Authority: 19 U.S.C. 66, 1499, 1623, 1624.

§ 118.0 Scope.

This part sets forth regulations providing for the making of agreements between Customs and persons desiring to operate a Centralized Examination Station. It covers the application process, the responsibilities of the person or entity selected to be a CES operator, the CES operator's agreement, the procedures for moving merchandise to a CES for examination, the grounds and procedures for revoking a selection and cancelling an agreement or proposing to revoke and cancel, and the appeal rights following either immediate or proposed revocation and cancellation.

SUBPART A—GENERAL PROVISIONS

§ 118.1 Definition.

A Centralized Examination Station (CES) is a privately operated facility at which imported merchandise is made available to Customs inspectors for physical examination. A CES may be established in any port or any portion of a port, or any other area under the jurisdiction of a district director.

§ 118.2 Establishment of Centralized Examination Stations.

When a district director determines the need for a port to establish a CES, or an additional CES, and when the term of an existing CES is about to expire, he will announce by written bulletin posted at the customhouse that applications to operate a CES are being accepted. This bulletin will include the general criteria (see § 118.11), and any local criteria that applicants must meet. Applications will be accepted for 60 days from the date of such announcement. Applications will only be accepted in response to a district director announcement.

§ 118.3 Written agreement.

The applicant tentatively selected to operate a CES must sign a written agreement with Customs before commencing operations. Failure to execute a written agreement with Customs in a timely manner will result in the revocation of that applicant's tentative selection and the tentative selection of another applicant. In addition to the provisions described elsewhere in this Part, the agreement will specify the duration of the authority to operate the CES. That duration will be not less than three years nor more than five years. Such agreements cannot be transferred, sold, inherited, or conveyed in any manner. At the expiration of the agreement, an operator wishing to reapply may do so pursuant to this Part and his application will be considered de novo.

§ 118.4 Responsibilities of Centralized Examination Station Operator.

By signing the agreement to operate a CES, an operator agrees to:

(a) Maintain the facility designated as the CES in conformity with the security standards as outlined in his approved application;

(b) Provide adequate personnel and equipment to ensure reliable service for the opening, presentation for inspection, and closing of all types of cargo designated for examination by Customs. Such service must be provided on a "first come - first served" basis;

(c) Assess service fees as outlined in the fee schedule included in the approved application and bill users directly for services rendered. The CES operator must provide 90 days notice to Customs of any proposed fee changes. In the case of a fee increase, the operator must include written justification for the increase. The district director may consider whether to allow a CES operator to use a new fee schedule. Unless so approved, the CES operator is bound by the fee schedule in his approved application;

(d) Assume responsibility for any charges or expenses incurred in connection with the operation of the CES;

(e) Maintain, at his own expense, adequate liability insurance with respect to the property within his control and with respect to persons having access to the CES;

(f) Keep current the list filed with the district director pursuant to § 118.11(f). Additions to or deletions from the list must be submitted in writing to the district director within 10 calendar days of the commencement or termination of employment;

(g) Maintain a Customs custodial bond in an amount set by the district director and further agrees to its application as a performance bond to the CES operation. The operator also agrees to increase the amount of the bond if deemed appropriate by the district director;

(h) Maintain all records connected with the operation of the CES in accordance with Part 162 of this chapter and retain such records for a period of not less than five years from the date of the transaction or examination conducted pursuant to the agreement to operate the CES. Further, such records will be made available for inspection upon demand by Customs;

(i) Submit, if requested by Customs, the fingerprints of all employees involved in the CES operation.

(j) Provide office space, parking spaces, appropriate sanitary facilities, and potable water to Customs personnel at no charge or a charge of $1 per year; and

(k) Perform in accordance with any other reasonable requirements imposed by the district director.

Subpart B—Application to Establish Centralized Examination Station

§ 118.11 Contents of application.

The application to operate a CES must consist of the following and any application not providing the following information will not be considered. The responses to paragraphs (b), (c), (d), (g), (h) and (i) are the criteria used to judge the applications:

(a) The name and address of the facility to be operated as the CES, the names of all principals or corporate officers, and the name and telephone number of an individual to be contacted for further information;

(b) A description of the CES's accessibility within the port or other location, and a floor plan of the facility actually dedicated to the CES operation showing bay doors, office space, exterior features, security features, and staging and work space;

(c) A schedule of fees clearly showing what the applicant will charge for each type of service;

(d) A detailed list of equipment showing the applicant can make a diverse variety of cargo available for examination in an efficient and timely manner;

(e) A copy of an approved custodial bond on Customs Form 301. If the applicant does not possess such a bond, a completed CF 301 must be included with the application which will be approved upon selection;

(f) A list of all employees involved in the CES operation giving their names, dates of birth, and social security numbers (Providing social security numbers is voluntary; however, failure to provide the number may hinder the investigation process.);

(g) Any information showing the applicant's experience in international cargo operations, and knowledge of Customs procedures and regulations, or a commitment to acquire that knowledge;

(h) Any information that relates to other commercial business activities, or relationships, or other Customs activities or relationships that are an actual or potential conflict of interest; and

(i) Any other information that the district director considers essential to the selection process based on port conditions.

§ 118.12 Review of application.

The district director, after review of all applications, shall select the one or more applicants that will be granted authority to operate a CES. The district director will select the one or more applicants that will best meet the examination needs of the Customs Service and facilitate the movement of imported merchandise. The district director may use a CES committee made up of the importing community during the review of applications.

§ 118.13 Notification of selection or nonselection.

The applicant tentatively selected to operate a CES will be notified in writing by the district director of his tentative selection. All selections are tentative pending execution of a written agreement between Customs and the applicant. Upon execution of such written agreement, tentative selection becomes final. Applicants not selected to be CES operators will receive written notice of such fact. Such notice will state the reason or reasons for nonselection.

Subpart C — Movement of Cargo to a Centralized Examination Station

§ 118.21 Permission to transfer cargo to CES for examination.

When a shipment requires examination at a CES, Customs Form (CF) 3461, or CF 3461 (ALT) for land border cargo, or an attachment to either, may be used to request permission for such a transfer. The entry filer must write, type or stamp the following lines on the form or attachment, and must supply the information called for on the first three lines:

Containers to be transferred: ____ All or,
Container #'s ____, ____, ____
To CES ______________________
Approved by: U.S. Customs Inspector ___________
Date ___________

Unless the district director exercises his authority pursuant to § 118.24 of this Part, the reviewing inspector will initial and date the form or attachment being used, or stamp one copy of the CF 3461 if required by the district director. A copy of this document will act as notification and authorization to the entry filer that the merchandise must be transferred to the importer-designated CES.

§ 118.22 Assumption of liability during transfer.

Customs will allow merchandise designated for examination to be transferred from the importing carrier's point of unlading or from a bonded facility, to a CES, if such transfer takes place under one of the following bonded movements:

(a) If merchandise is transferred directly to a CES from an importing carrier, the importing carrier shall remain liable under the terms of its bond for the proper safekeeping and delivery of the merchandise until it is receipted for by the CES operator.

(b) If merchandise is transferred directly from a bonded carrier's facility to a CES or is delivered directly to the CES by a bonded carrier, the bonded carrier shall remain liable under the terms of its bond for the proper safekeeping and delivery of the merchandise until it is formally receipted for by the CES operator.

(c) If containerized cargo, including excess loose cargo that is part of the containerized cargo, is transferred to a CES operator's own facility using his own vehicles, the operator shall be liable under the terms of its own custodial bond.

(d) If the importer or his agent arrange for transfer of merchandise to a CES, the importer shall assume liability under the entry bond.

§ 118.23 Annual blanket transfer.

District directors may institute an annual blanket transfer application to facilitate any of the bonded movements described in § 118.22 of this chapter.

§ 118.24 Designation of bonded movement and CES to be used.

In the event the district director deems it necessary, he may direct the type of bonded movement used to transfer merchandise to a CES, as well as designate the CES at which examination must take place.

SUBPART D – TERMINATION OF CENTRALIZED EXAMINATION STATION

§ 118.31 Revocation of selection and cancellation of agreement to operate a Centralized Examination Station.

(a) *Immediate revocation and cancellation.* The district director may immediately revoke the selection as operator and cancel that person or entity's operator's agreement to operate a CES if:

(1) The selection and agreement were obtained through fraud or the misstatement of a material fact; or

(2) The CES operator or an officer of a corporation which has signed an agreement to operate a CES is convicted of, or has committed acts which would constitute, a felony or a misdemeanor involving theft, smuggling, or a theft-connected crime, and the conviction resulted from, or the subject acts were in fact committed, as part of their official duties as operator or corporate officer. Any change in the employment status of a corporate officer (*e.g.*, discharge, resignation, demotion, or promotion) prior to conviction for a felony or misdemeanor involving theft, smuggling, or a theft-connected crime, resulting from an act or acts committed in their official capacity as corporate officer will not preclude application of this provision.

(b) *Proposed revocation and cancellation.* The district director may propose to revoke the selection as operator and cancel the agreement to operate a CES if:

(1) The CES operator refuses or neglects to obey any proper order of a Customs officer or any Customs order, rule, or regulation relative to the operation of a CES, or fails to operate in accordance with the terms of his agreement;

(2) The CES operator fails to retain merchandise which has been designated for examination;

(3) The CES operator does not provide secure facilities or properly safeguard merchandise within the CES;

(4) The CES operator fails to furnish a current list of names, addresses and other information required by § 118.4; or

(5) The bond required by § 118.4 is determined to be insufficient in amount or lacking sufficient sureties, and a satisfactory new bond with good and sufficient sureties is not furnished within a reasonable time.

§ 118.32 Notice of revocation and cancellation.

The district director shall immediately revoke the selection as operator and cancel the agreement to operate a CES, or propose to revoke such selection and cancel such agreement, by serving notice in writing on the operator. The notice shall be in the form of a statement specifically setting forth the grounds for revocation and cancellation or proposed

revocation and cancellation and shall inform the operator of his right to appeal.

§ 118.33 Appeal procedure.

An operator wishing to appeal a revocation and cancellation or show cause why a proposed revocation and cancellation should not occur may, within 10 calendar days of receipt of the notice or proposal, file with the Regional Commissioner having jurisdiction over the district director that signed the notice or proposal a written appeal. A revocation and cancellation pursuant to § 118.31(a) of this Part shall remain in effect during any appeal. The appeal shall be filed in duplicate and shall set forth the response of the CES operator to the statements of the district director. The Regional Commissioner shall render a decision to the operator, in writing, stating the reasons therefor, by letter mailed within 30 working days following receipt of the appeal, unless the period is extended with due notification to the operator.

§ 118.34 Appeal from the Regional Commissioner's decision.

Upon a decision by the Regional Commissioner affirming the revocation of selection and cancellation of an agreement to operate a CES, or agreeing that a proposed revocation and cancellation should occur, the operator may file with the Commissioner of Customs, in writing, a request for such additional review as the Commissioner, or his delegate, deems appropriate. This request must be received by the Commissioner within 10 calendar days of the operator's receipt of the Regional Commissioner's decision. The Commissioner, or his delegate, shall render a decision to the operator, in writing, stating the reasons therefor, by letter mailed within 30 working days following receipt of the appeal, unless this period is extended with due notification to the operator.

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: July 18, 1991.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 23, 1991 (56 FR 33734)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Judges

Gregory W. Carman*
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

Morgan Ford

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

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* Acting as Chief Judge, effective May 1, 1991, pursuant to 28 U.S.C. § 253d.

Decisions of the United States Court of International Trade

(Slip Op. 91-57)

NAKAJIMA ALL CO., LTD., PLAINTIFF, AND SEARS, ROEBUCK AND CO., INTERVENOR-PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., INTERVENOR-DEFENDANT

Court No. 87-01-00089

MEMORANDUM

[Results of second remand to the International Trade Administration affirmed; judgment for the plaintiff and intervenor-plaintiff.]

(Decided July 11, 1991)

McDermott, Will & Emery (David J. Levine) and *Eckert Seamans Cherin & Mellott (R. Sarah Compton)* for the plaintiff.

Barnes, Richardson & Colburn (Robert E. Burke and *Brian F. Walsh)* for the intervenor-plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Pamela A. Green*), of counsel, for the defendant.

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr. and *Todd C. Fineberg)* for the intervenor-defendant.

AQUILINO, *Judge*: The plaintiff and the intervenor-plaintiff request that the court affirm the results of remand proceedings filed by the International Trade Administration, U.S. Department of Commerce ("ITA") in conjunction with slip op. 90-67, 14 CIT ____, 744 F. Supp. 1168 (1990), and slip op. 91-23, 15 CIT ____, 761 F. Supp. 142 (1991), and that final judgment be entered in their favor.

Familiarity with slip opinions 90-67 and 91-23 is presumed. In 90-67 the court concluded that, while the ITA has broad discretion in the enforcement of the trade law and its expertise is entitled to deference, its

> decision to investigate Nakajima's costs of production all over again in 1985 was not supported by substantial evidence on the record or otherwise in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B) * * * and this matter [had to] be remanded to the agency for further proceedings * * * regarding the margin of dumping, if any, of plaintiff's merchandise for the period May 1, 1981 to April 30, 1982.

14 CIT at ____, 744 F. Supp. at 1177.

As ordered, the ITA conducted further proceedings and filed the results thereof, concluding that the revised weighted-average margin for

the plaintiff for the period in question was 0.0024 percent. In reaching this conclusion, the agency stated that in

> accordance with the [court's remand] order we have completed the analysis of Nakajima All Co., Ltd. ("Nakajima") using the home market sales data submitted * * * in its amended questionnaire response of March 11, 1983, rather than using the best information otherwise available.
>
> * * * * * * *
>
> The CIT directed the Department to rely on the data submitted by Nakajima rather than use BIA.
>
> In our revised analysis we have removed all of the BIA data originally used for the home market analysis and inserted sales data from Nakajima's amended questionnaire response of March 11, 1983. Sales data were entered on the computer program for models 7500, 8500, 8600, and M100, and margins were calculated based on Nakajima's sales data. We made no change to the foreign market value calculated in the January 14, 1987 final results for model 8800C. The calculation of U.S. price for all five models in the same as that employed in the original analysis.
>
> We made adjustments to the foreign market value for Japanese inland freight, the difference between packing for sale in Japan and packing for sale in the United States, differences in merchandise, and differences in credit.

On subsequent review of these remand results, the court concluded in slip op. 91-23 that the statement that it had directed the Department to rely on data submitted by Nakajima rather than use the best information otherwise available was clearly erroneous and that this misapprehension was the apparent linchpin of the outcome. Thereupon, slip op. 91-23 stated that the prior opinion of the court had held only that

> the ITA could not have initiated a cost-of-production investigation based on the record then in existence. As for what the agency should have done after remand, if any party was effectively precluded from providing information which might shed light on the margin of dumping of plaintiff's merchandise for the period under review, those proceedings were not carried out in accordance with the law of this case. That is, on the record at hand, the court cannot conclude otherwise, nor is it able to conclude that, if the ITA excluded information, such exclusion constituted harmless error. Hence, a second remand is necessary – to afford the agency an opportunity to receive and consider whatever data the parties may possess and which bear on the ultimate question presented for redetermination.

15 CIT at ____, 761 F. Supp. at 144.

The ITA has now submitted its redetermination, which is summarized as follows:

> * * * [P]ursuant to the second remand from the Court of International Trade * * *, we have completed these remand results after affording the parties an opportunity to submit further information and comments.
>
> Based on our analysis of the information and comments received, we determine that the supplemental information submitted by Smith Corona, concerning its allegation of sales below cost of production, fails to assuage the shortcomings identified by the Court of International Trade in the Court's original remand decision of July 20, 1990 (Slip op. 90-67). As a result, the Department determines that Smith Corona's sales below cost of production allegation is inadequate; therefore, the Department used verified sales information submitted by Nakajima during the administrative review to complete this remand. Consequently, the result of the first remand remains unchanged.

As indicated above, the plaintiff and the intervenor-plaintiff request that this redetermination be affirmed. In response, the intervenor-defendant continues to cling to the concept that its market-research report, which was discussed at length in slip op. 90-67, constitutes the best information available for the purpose of determining the dumping margin.

The ITA's summary shows that it was unable to agree with the intervenor-defendant, but at least the report of the agency's second remand proceedings reveals that the intervenor-defendant was afforded an appropriate opportunity to present information and attempt to persuade it otherwise. Indeed, the instant Response of Smith Corona Corporation to Final Results of Remand Redetermination does not disagree on this point.

After review of the entire ITA report, and in the light of the existing record, the court concludes that the results of the remand proceedings are now supported by substantial evidence on the record and are otherwise in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B). Judgment will enter accordingly.

(Slip Op. 91-58)

BROTHER INDUSTRIES, LTD. AND BROTHER INTERNATIONAL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND SMITH CORONA CORP., INTERVENOR-DEFENDANT

Court No. 88-11-00860

OPINION AND ORDER

[Plaintiffs' motion for judgment on the agency record granted in part and denied in part; remanded to the International Trade Administration.]

(Decided July 12, 1991)

Tanaka Ritger & Middleton (*H. William Tanaka, Patrick F. O'Leary* and *Alice L. Mattice*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane E. Meehan*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Pamela A. Green*), of counsel, for the defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Todd C. Fineberg*) for the intervenor-defendant.

AQUILINO, *Judge*: The plaintiffs have interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Portable Electric Typewriters From Japan Final Results of Antidumping Duty Administrative Review*, 53 Fed. Reg. 40,926 (Oct. 19, 1988). As indicated, the review was carried out under the aegis of an antidumping-duty order for portable electric typewriters ("PETs") from Japan[1] and covered the years May 21, 1982 to May 20, 1983, May 21, 1983 to May 20, 1984, May 21, 1984 to April 30, 1985, and May 1, 1985 to April 30, 1986. It resulted in dumping margins for those respective periods of 0.62, 0.32, 0.44 and 4.00 percent for Brother PETs.

Nonetheless, the plaintiffs take the position that the those results are unsupported by substantial evidence on the record and otherwise not in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B). Their motion alleges that the ITA erred in numerous ways, including (1) applying section 615 of the Trade and Tariff Act of 1984 retroactively to shipments exported before the act's effective date; (2) disregarding a supplemental submission of sales information and relying instead on best information available; (3) failing to adjust for appreciation in value of the Japanese yen in 1985-86; (4) failing to adjust for the full amount of a claimed rebate in computing foreign-market values; (5) double counting corporate advertising expenses in computing exporter sales prices; (6) failing to make a circumstance-of-sale adjustment for certain direct expenses and deducting an incorrect amount of indirect expenses in the exporter-sales-price offset adjustment; (7) double counting packing expenses in constructing values; (8) deducting an incorrect exporter-sales-

[1] *See* 45 Fed.Reg. 30,618 (May 9, 1980).

price offset adjustment as a result of a computer programming error; (9) double counting certain export sales; (10) using incorrect sales dates, exchange rates, and foreign-market values in calculating the dumping margins; (11) failing to delete erroneous home-market sales information from the computer data base; and (12) failing to adjust for home-market commissions in computing foreign market values.

As discussed hereinafter, the defendant acquiesces in remand on some of these points and opposes the others, whereas the intervenor-defendant takes the position that relief is not necessary. Jurisdiction of the court is pursuant to 28 U.S.C. § 1581(c).

I

The Trade Agreements Act of 1979, 19 U.S.C. § 1677b(a)(1) (1980), provided that, in general, the foreign market value of imported merchandise was to be the price, at the time of exportation of such merchandise to the United States, at which it was sold or offered for sale in the principal markets of the country from which exported. Section 615(1) of the Trade and Tariff Act of 1984, Pub.L. No. 98-573, 98 Stat. 2948, 3036-37, deleted the time-of-exportation clause, amending section 1677b(a)(1) to state that the foreign market value of imported merchandise

> shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person who is not described in subsection (e)(3) of this section with respect to such person—
>
>> (A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption * * *.

In other words, while time remained an element of this provision, it changed from the moment of exportation to the moment of first sale within the United States, references which are not necessarily synchronous.

In the determination at bar, the ITA relied on this change in reviewing plaintiffs' entries, those which occurred before the enactment in 1984 as well as those thereafter. Brother objected to this approach for merchandise exported prior to October 30, 1984. The agency overruled the objection, *Comment 76*, responding that it

> based exchange rate calculations and home market comparison sale selections for sales date rather than export date. This is consistent with the Depa[r]tment's practice in conducting administrative reviews which were initiated after and covered sales prior to October 30, 1984. The initiation notices of antidumping duty administrative review for the periods subject to this review were published on June 23, 1986 and July 9, 1986. Also, the use of sale date rather than export date is consistent [*sic*] with the final results of the

> administrative review of this case covering the 1981-82 period (52 FR 1504, January 14, 1987).

53 Fed.Reg. at 40,936. The plaintiffs renew their objection now.

A

If an act is silent or ambiguous with respect to a specific issue, the question for the court is whether or not an agency's approach is based on a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). In arguing in the affirmative, the defendant relies on section 626 of the 1984 act, providing, in pertinent part:

> EFFECTIVE DATES.
>
> (a) Except as provided in subsections (b) and (c), this Act, and the amendments made by it, shall take effect on the date of the enactment of this Act.
>
> (b)(1) The amendments made by sections 602, 609, 611, 612, and 620 shall apply with respect to investigations initiated by petition or by the administering authority under subtitles A and B of title VII of the Tariff Act of 1930 on or after such effective date.
>
> (2) The amendments made by section 623 shall apply with respect to civil actions pending on, or filed on or after, the date of the enactment of this Act. * * *

Since 615 was not included among those sections specified for prospective application, the defendant argues that section 626(a) controls: "if section 626(a) were read any differently than that the amendments are to take effect immediately with respect to all administrative proceedings, then section 626(b) would be superfluous."[2]

The plaintiffs counter that this is not only impermissible *post hoc* rationalization, it amounts to a concession that the ITA response to Comment 76, quoted above, is "not colorable in light of the language of * * * Section 626(b)(1)."[3] And it is that response, the plaintiffs argue, which renders that section superfluous because every provision of the 1984 act is already applicable to proceedings begun on or after its effective date. Since no part of a statute should be construed as superfluous if there is an alternative interpretation, the plaintiffs conclude that the proper reading of section 615 is that it took effect for entries on or subsequent to enactment.

However, to the extent that the defendant regards the review proceedings as begun after the act's effective date, it is not inconsistent with the response to Comment 76 for the defendant to argue that section 615 applied. While that stance may tend to make section 626(b)(1) unnecessary, as the plaintiffs point out, their preferred interpretation would not logically follow even if defendant's original position were untenable. The 1984 act states only that it is to take effect as of the

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[2] Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Judgment Upon the Administrative Record, p. 17.

[3] Plaintiffs' Response to Defendant's and Defendant-Intervenor's Memoranda in Opposition to Plaintiffs' Motion for Judgment on the Agency Record, p. 15.

enactment date. Prospective implementation is explicit in 626(b)(1), but that subsection makes no mention of section 615, which therefore took effect on the enactment date. *Washington Red Raspberry Comm'n v. United States*, 11 CIT 173, 182, 657 F.Supp. 537, 545 (1987), *aff'd*, 859 F.2d 898 (Fed.Cir. 1988).

On another tack, the plaintiffs allege that the ITA's reliance on section 615 herein is at odds with its practice of not applying that section in reviews of entries pre-dating the 1984 act. They have submitted two attorney affidavits in support of their position.[4] One points to a preliminary review proceeding of tapered roller bearings covering the period April 1, 1974 through March 31, 1979 and reported on at 54 Fed.Reg. 12,938 (March 29, 1989), in which "the ITA used 'shipment date' to determine currency conversions and foreign market values" for a responding firm with which the affiant claims familiarity. Plaintiffs' Response, Appendix 3 at p. 2. The other affidavit asserts that the proceedings *sub nom. Television Receiving Sets, Monochrome and Color, From Japan*, 50 Fed. Reg. 24,278 (June 10, 1985), and *Portable Electric Typewriters From Japan*, 52 Fed. Reg. 1,504 (Jan. 14, 1987), covered pre-1984 review periods, were initiated prior to the effective date of the 1984 act but completed afterwards, and relied on the 1979 act in calculating foreign-market values for the respective goods and comparing them with exporters' sales prices. *See* Plaintiffs' Response, Appendix 2.

On their face, these references do appear to support the notion of different ITA approaches for review proceedings begun before and after the 1984 act, but the plaintiffs state at page 19 of their memorandum that the "1982-1983, 1983-1984 and 1984-1985 period reviews were all initiated after the effective date of the 1984 Act". Their reply memo, on the other hand, backpeddles to contend that at least two of the reviews had been initiated automatically prior to the effective date. In either event, when the 1984 act eliminated automatic initiation, the ITA allowed parties to request review for all outstanding orders for periods for which proceedings had not been completed. *See* 50 Fed.Reg. 32,556, 32,557 (Aug. 13, 1985).

The plaintiffs argue that the requested ensuing proceedings were not new, just "reinitiated" old ones, and that reviews of entries begun prior to the 1984 act ought to have been carried out according to the contemporaneous definition of foreign-market value. However, whether that

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[4]The intervenor-defendant has filed a motion to strike the affidavits as an attempt to expand the administrative record beyond that allowed under 19 U.S.C. § 1516a(b) (2) (A), citing, *inter alia, Ipsco, Inc. v. United States*, 13 CIT ____, ____, 715 F.Supp. 1104, 1109 (1989); *Armco Inc. v. United States*, 13 CIT ____, 712 F.Supp. 214 (1989); and *PPG Industries, Inc. v. United States*, 13 CIT ____, 708 F.Supp. 1327 (1989). It claims that, like a letter in *Ipsco* relating to an end-use certification procedure employed by the ITA after conclusion of the agency proceeding, "these affidavits containing attorneys' recollections of agency practice were not presented until after the proceedings were over and the record was closed." Intervenor-Defendant's Motion to Strike, p. 3.

This is true, but the court considers the affidavits to be within the realm of permissible legal argument under 19 U.S.C. § 1516a(b)(1)(B). When the agency rationale for its determination is consistency with prior administrative decisions, the nature of the methodology underlying them has bearing upon whether the determination was in accordance with law. In short, intervenor-defendant's motion to strike must be, and hereby is, denied. *Cf. Hercules, Inc. v. United States*, 11 CIT 710, 735, 673 F.Supp. 454, 476 (1987).

act affected a "right" to, or a "remedy" of, automatic review[5], and whether requests made in accordance therewith are couched as either for non-discontinuance of proceedings started automatically under prior law or for initiation, plaintiffs' position focuses on whether or not the ITA's approach was in accordance with law within the meaning of 19 U.S.C. § 1516a(b)(1)(B). In this court's judgment, the answer thereto hinges on whether the 1984 act countenanced determination of the review proceedings at bar based on the statutory change to 19 U.S.C. § 1677b(a)(1), *supra*. On this issue, the court cannot conclude that it was not in accordance with law for the ITA to have proceeded as it did. That is, the agency's approach was based upon a permissible construction of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., supra.*

B

The plaintiffs claim that they relied upon the 1979 definition of foreign-market value in setting their export sales prices, which "compliance efforts" were unfairly nullified by the ITA's subsequent determination. In other words, the plaintiffs complain that the agency approach affected conduct in reliance upon existing law. Plaintiffs' Memorandum, p. 21. They refer to *Zeneth Radio Corp. v. United States*, 1 CIT 180, 184, 509 F.Supp. 1282, 1286 (1981), and *Cementos Guadalajara, S.A. v. United States*, 12 CIT 307, 328, 686 F.Supp. 335, 351-52 (1988), *aff'd*, 879 F.2d 847 (Fed.Cir. 1989), *cert. denied*, 110 S.Ct. 1318 (1990), for the proposition that liability for duties attaches at entry. They assert that entries must be liquidated according to the law in effect then. *See* Plaintiffs' Response, p. 16, n. 8.

Cementos involved the question of whether a nation which becomes a "country under the Agreement" within the meaning of 19 U.S.C. § 1671(b) is then entitled to an injury determination by the International Trade Commission pursuant to section 1671(a) even as to pre-existing, unliquidated entries before countervailing (or antidumping) duties could be imposed on them. The resolution of that issue, as affirmed by the court of appeals, focused on the fact that liability for unfair-trade duties attaches at entry, and thus that is the time which determines applicable law. *Zenith* is to the same effect. However, the dispute here is not with the underlying antidumping-duty order. Rather, the point of reference of this action is subsequent administrative review. *Cf. Al Tech Specialty Steel Corp. v. United States*, 6 CIT 245, 575 F.Supp. 1277 (1983), *aff'd*, 745 F.2d 632 (Fed.Cir. 1984). Entry is not *per se* determinative of the law governing that process, which, by nature, is *ex post facto*. *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 568 (Fed.Cir. 1989), for example, affirmed reliance on a statutory amendment requiring collection of accrued interest. The amendment had been enacted after entry but before final assessment of duties.

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[5] *See generally Interredec, Inc. v. United States*, 11 CIT 45, 652 F.Supp. 1550 (1987).

Accrual was included, albeit from the date of change rather than of entry.

It is true, as the defendant points out, that the law in effect at the time of a court's decision is to be applied, unless the result in doing so would produce "manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974). And immediate application is the rule where new law affects only procedure or remedies. *See, e.g., Friel v. Cessna Aircraft Co.*, 751 F.2d 1037, 1039 (9th Cir. 1985); *Monsanto Co. v. United States*, 12 CIT 949, 951, 698 F.Supp. 285, 288 (1988). *Cf. United States v. Kairys*, 782 F.2d 1374, 1381 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986). On the other hand, it is also true that there has been general rejection of retroactive application. *E.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) and also id. at 223 (Scalia, J., concurring)("Retroactive legislation has always been looked upon with disfavor, * * * and even its constitutionality has been conditioned upon a rationality requirement beyond that applied to other legislation"); *Rhone Poulenc, Inc. v. United States*, 14 CIT ___, ___, 738 F. Supp. 541, 543 (1990). Hence, the "first rule" of statutory construction continues to be stated to be that

> legislation must be considered as addressed to the future, not the past. * * * [R]etrospective operation will not be given to a statute which interferes with antecedent rights * * * unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

United States v. Security Industrial Bank, 459 U.S. 70, 79 (1982) (citation omitted).

The plaintiffs contend that the 1984 act lacks clarity on this count.[6] When the intention of the legislature is not manifest,[7] the nature of the interest with which interference is claimed must be evaluated. *See, e.g., Bradley v. Richmond School Board, supra*; *E.L. Wiegand Division, Emerson Electric Co. v. N.L.R.B.*, 650 F.2d 463 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982); *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). The plaintiffs argue that an exporter's good faith efforts to monitor pricing

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[6] Ambiguity in the language of this statute has given rise to other litigation, including, for example, over the intendment of "investigations" as originally enacted in section 626(b)(1). *See, e.g., Al Tech Speciality Steel Corp. v. United States*, 745 F.2d 632 (Fed.Cir. 1984); *Interredec, Inc. v. United States, supra*.

Elsewhere, language identical in substance to section 626(a) has been construed as indicating congressional intent for prospective application. *E.g., Franklin v. State of New Mexico*, 730 F.2d 86 (10th Cir. 1984).

[7] All the definitional sections of H.R. 4784, which contained the precursor to section 626 of the 1984 act, were made prospective. After passage in the House of Representatives, the Senate considered H.R. 4784 along with other bills and proposed several amendments. One proposal was an amendment to the definition of foreign-market value (ultimately section 615 of the 1984 act), although no corresponding amendment to section 626 explicitly making 615 prospective as with other definitional sections was proposed. *See* 130 Cong. Rec. 29,410, 29,411, 29,432-33 (Oct. 3, 1984). When H.R. 4784 was sent back to the House, it was :incorporated into H.R. 3398, which ultimately became Pub.L. No. 98-573, 98 Stat. 2948 (Oct. 30, 1984).

> is precisely the conduct the antidumping laws are designed to encourage. * * * Therefore, in the absence of a specific provision to the contrary, the 1984 Act must be read to prohibit retroactive application – particularly where, as here, the amendment affects the behavior of "'practical' men" in the daily course of their business.[8]

The defendant responds that a

> vested right is more than a mere expectation based upon the anticipated continuance of the existing law. * * * It is well-established that no one has a vested right to trade with foreign nations and that no one has a legal right to the maintenance of an existing rate of duty. Because importers, thus, have no vested legal right to have antidumping duties assessed upon the basis of any particular methodology, plaintiffs had no vested right which was affected by section 615.

Defendant's Memorandum, pp. 20-21 (citations omitted). *See also id.* at 17-18.

Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion. But methodology still must be lawful, which is for the courts finally to determine. *See, e.g., Ipsco, Inc. v. United States*, 12 CIT 359, 687 F.Supp. 614, *remanded*, 12 CIT 1128, 701 F.Supp. 236 (1988), *aff'd after remand*, 13 CIT ___, 710 F. Supp. 1581 (1989), *rev'd in part*, 899 F.2d 1192 (Fed.Cir. 1990); *Uddeholm Corp. v. United States*, 11 CIT 969, 676 F.Supp. 1234, (1987); *British Steel Corp. v. United States*, 10 CIT 224, 632 F. Supp. 59 (1986). *Cf. Matsushita Electric Industrial Co. v. United States*, 861 F.2d 257, 260 (Fed.Cir. 1988); *PPG Industries, Inc. v. United States*, 14 CIT ___, ___, 746 F.Supp. 119, 127-32 (1990). Indeed, the law the ITA applies guards against unlawful method while also guarding against injurious unfair foreign competition.

The fundamental reason for prospective application is to avoid "the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pacific R.R. Co. v. Laramie Stock Yards Co.*, 231 U.S. 190, 199 (1913). *See also Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *Friel v. Cessna Aircraft Co., supra*; *Daughters of Miriam Center for the Aged v. Mathews*, 590 F.2d 1250 (3d Cir. 1978); *N.L.R.B. v. St. Luke's Hospital Center*, 551 F.2d 476 (2d Cir. 1976). An outstanding antidumping-duty order indicates to the world that covered imported merchandise is subject to duties thereunder, assessed according to law. As has been stated,

> Customs law has ceased to be a matter of domestic interest only * * *. It is a matter of international concern. This is particularly

[8] Plaintiffs' Memorandum, p. 25 (citation omitted). The reference to "practical men" comes from *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed.Cir. 1988). However, that case involved Customs enforcement in circumstances by no means free of other considerations. *See, e.g., Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984)("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant"), citing *INS v. Hibi*, 414 U.S. 5, 8 (1973), and *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 383 (1947).

> true of antidumping and countervailing duties. They have long been matters dealt with in the GATT, and it has been difficult to reconcile our, at times, drastic laws with internationally recognized standards of fair dealing. Congress has undertaken to master this problem in part by codifying procedures other countries can notice and rely on, and in part by "judicializing" the process so that procedural, as well as substantive, rights can be recognized and enforced in courts.[9]

Reliance cannot be presumed, however. The standard for this court's review of a claim thereof is "substantial evidence on the record", 19 U.S.C. § 1516a(b)(1)(B). The plaintiffs state:

> * * * As explained at the ITA hearing, Brother has an established practice of monitoring its export prices to ensure compliance with the antidumping law. Logically, the only guidance Brother can have in this process is the law *in effect at the time* the pricing decisions are made. Thus, in May 1982, almost two and one-half years before the 1984 Act, BIL set its export prices to BIC by comparison with its home market prices as of the *date of export*, using the appropriate exchange rate in effect at the time. BIL also used the export date to determine the "most similar" home market model for purposes of the fair value calculation. While the transfer price to BIC is not the basis of the United States price * * * calculations, this methodology provided reasonable certainty that dumping would be avoided if the transfer price was set high enough. * * * [W]hen the ITA * * * based FMV on *sales* date rather than export date, BIL's antidumping price compliance efforts were unfairly nullified. Depending on the sales date, dumping margins appeared where little or no margin previously existed.[10]

No other citations or support are provided, and independent examination of the record has failed to discover proof of Brother reliance on the U.S. law in setting prices.[11] In this absence of substantial evidence on the record, the plaintiffs have failed to state a claim upon which relief can be granted.

II

The plaintiffs also complain that the ITA disregarded information voluntarily submitted to supplement an inadequate questionnaire response for 1984-85. As required, Brother had provided information on

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[9] *Samsung Electronics Co. v. United States*, 873 F.2d 1427, 1431 (Fed.Cir. 1989)(Nichols, J. dissenting).

[10] Plaintiffs' Memorandum, pp. 24-25 (emphasis in original), referring to Brother's pre-hearing brief to the ITA, Confidential Document ("ConfDoc") 161, p. 13.

[11] A purchasing agreement concluded between BIL and BIC prior to the effective date of the 1984 act and included in plaintiffs' confidential questionnaire response for the 1984-85 period incorporated two separate listings of prices for PETs by reference. *Compare* ConfDoc 42, Appendix 1, arr. 2 *with id.*, Appendixes 5-A *and* 5-B. The first list covered prices for the period beginning prior to and ending about a month beyond the effective date of the 1984 act and listed each model of PET available for export to the United States. Next to each model were listed the export price (in dollars) and the date from which the listed price went, or would go, into effect, invariably one of three dates between 1983 and 1984. The second price list was published just after the 1984 act took effect and appeared in the same format as the first. Different model numbers were listed, although the total number of PETs remained the same. Of the models the same on either list, some revisions to prices were apparent (downward, no less) and made effective as of future dates certain, often well after October 30, 1984.

On its face, this record is not adequate to support the contention that the revisions were responsive to the U.S. law as opposed to other conditions.

both computer tape and printout. *See* Record Document ("R.Doc") 176. Allegedly, preparation of the tape had resulted in an inadvertent deletion of sales data[12] for three PET models in the timely submission. Over a year later, the plaintiffs discovered the omission and brought it to the attention of the case analyst by supplying a "correction" to their computer tape. R.Doc 428. Thereafter, the ITA published the preliminary results, which stated:

> On February 18, 1988, Brother submitted data for previously unreported U.S. sales for three models for the [1984-85] period. Because the submission was untimely, we applied the best information available to these sales. The best information available was based on sales for which Brother reported timely information.

53 Fed.Reg. 20,353, 20,354 (June 3, 1988). The agency's final determination states:

> Although the Department does have discretion to use in unusual situations information untimely submitted, respondents making untimely submissions run a high risk that the Department will use the best information otherwise available to calculate dumping margins. Absent this approach, respondents would have no incentive to make timely submissions. In this case, time constraints alone are sufficient to prevent us from using Brother's late-submitted sales data.
>
> * * * We continue to use the best information otherwise available only for the sales in question, and not for all sales for the 1983-84 and 1984-85 periods. Furthermore, we agree with Brother that the margin applied to these sales could serve as a disincentive for respondents otherwise willing to volunteer information inadvertently omitted from the original response. For the final results, we have applied the highest weighted-average margin found to exist for a responding firm during the 1984-85 review period to Brother's late-submitted purchase price sales.

53 Fed.Reg. at 40, 928-29.

Section 1677e of Title 19, U.S.C. requires resort to the best information otherwise available whenever a party "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation". The question is whether that section controlled the circumstances at bar.

On the one hand, the ability of the agency to set and enforce its own deadlines is an area well within its discretion[13], and a party has an obligation to file by ITA deadlines or to obtain extensions of time. *Cf.* 19 C.F.R. §§ 353.31, 355.31 (1990). The law does not permit a party to pick and choose information it wishes to present to the agency, and a deficient submission may lead to an undesired result. *See, e.g., N.A.R.*,

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[12] They covered model 5307 for February and March 1984 and models 5337 and 5366 for March and July 1984. *See* R.Doc 428. According to the plaintiffs, the computer tape originally contained double input on sales. The plaintiffs allege that, upon discovering and attempting to correct this error, they then inadvertently deleted those sales entirely. *See* ConfDoc 161, Exhibit 17.

[13] *See, e.g. Rhone Poulenc, Inc. v. United States*, 13 CIT ____, 710 F.Supp. 341 (1989), *aff'd*, 899 F.2d 1185 (Fed.Cir. 1990).

S.p.A. v. United States, 14 CIT ___, 741 F.Supp. 936 (1990). On the other hand, 19 C. F.R. § 353.51(b) (1988) offered an

> opportunity to correct inadequate submissions * * * if the corrected submission is received in time to permit proper analysis and verification of the information concerned; otherwise no corrected submission will be taken into account.[14]

Obviously, timeliness relates to the ITA's ability to comprehend information before rendering a determination. Presumably, a "correction" correlates to matter already part of the record while an "omission" lacks such correlation. That is, a submission of previously-omitted information may well be the equivalent of entirely new data and beyond the ability of the agency to digest and incorporate. In this instance, the ITA apparently regarded plaintiffs' voluntary submission as within the camp of correction. The plaintiffs point out that 105 days elapsed before publication of the preliminary determination, and they argue that this amount of time negated any claimed inability to consider their data.

On judicial review of an original investigation, the timeliness of a submission has been evaluated from the perspective of receipt. *See, e.g., Floral Trade Council of Davis, California v. United States*, 13 CIT ___, ___, 704 F.Supp. 241, 243 (1989). Here, of course, a subsequent administrative review is involved, and the absence of a date certain for publication of the preliminary determination at the time of receipt puts the matter on a somewhat different footing. Nonetheless, in view of the significant lapse of time prior to plaintiffs' discovery and then submission, the court cannot conclude that the agency abused its discretion in not considering the proffered data. On the other hand, an inability to produce information caused by the ITA itself has warranted reconsideration[15], as have timeliness issues of the agency's own making. *See, e.g., Daewoo Electronics Co. v. United States*, 13 CIT ___, ___, 712 F.Supp. 931, 945 (1989).

Be that as it may, the ITA strives for accuracy and is aware that its own errors can call for correction without judicial intrusion. *See, e.g., Koyo Seiko Co. v. United States*, 14 CIT ___, ___, 746 F.Supp. 1108, 1109 (1990). Moreover, court-ordered amendments of ministerial errors are not destructive of the ITA's ability to manage its proceedings. *See, e.g., Ipsco, Inc. v. United States*, 14 CIT ___, Slip Op. 90-37 (April 16, 1990); *Daewoo Electronics Co. v. United States, supra; Asociacion Columbiana de Exportadores de Flores v. United States*, 13 CIT ___, 704 F.Supp. 1114 (1989), aff'd, 901 F.2d 1089 (Fed.Cir.), *cert. denied*, 111 S. Ct. 136 (1990); *Timken Company v. United States*, 7 CIT 319, 320 (1984). Finally, even a party's ministerial or clerical errors have warranted correction where remand has been necessary on other grounds. *E.g., Koyo Seiko Co. v. United States, supra; Serampore Industries Pvt.*

[14] The ITA has stated that it "normally allows minor revisions to questionnaire responses after the preliminary determination and during verification". *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed.Reg. 18,992, 19,034 (May 3, 1989).

[15] *See, e.g., Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565 (Fed.Cir. 1990).

Ltd. v. U.S. Dep't of Commerce, 12 CIT 825, 834, 696 F.Supp. 665, 673 (1988).

In this case, since the ITA apparently regards plaintiffs' submission as mere clerical correction, and since remand is necessary on other grounds, discussed hereinafter, the court deems it appropriate for the agency to attempt to take plaintiffs' data into account. However, this decision is not to be construed as undermining the ITA's authority to disregard untimely information. *See, e.g., Koyo Seiko Co. v. United States*, 14 CIT at ___, 746 F.Supp. at 1110 ("if determinations were constantly subject to amendment, 'it would be difficult to answer the question as to when a *final* determination would ever be made'"), quoting *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 10 CIT 241, 245, 633 F.Supp. 1364, 1369 (1986) (emphasis in original). *See also Chinsung Industrial Co. v. United States*, 13 CIT ___, 705 F.Supp. 598 (1989); *Uddeholm Corp. v. United States, supra*. But it would also be paradoxical to remand when the ITA commits clerical errors yet deny reconsideration at the same time of similar errors by others.

III

The plaintiffs allege that the ITA's 1985-86 determination is distorted by "unprecedented and rapid" changes in the exchange rate which should have been accounted for under 19 C.F.R § 353.56(b)[16]. This issue apparently was not raised during the proceedings below, and the defendant and intervenor-defendant contend that the plaintiffs therefore may not raise the issue now before the court.

However, among the exceptions to the requirement of exhaustion of administrative remedies are "judicial interpretations of existing law after decision below and pending appeal – interpretations which if applied might have materially altered the result." *Hormel v. Helvering*, 312 U.S. 552, 558-59 (1941); *PPG Industries, Inc. v. United States*, 12 CIT 1189, 1192-93, 702 F.Supp. 914, 916 (1988). *Industrial Quimica del Nalon, S.A. v. United States*, 13 CIT ___, 729 F.Supp. 103 (1989), represents such an interpretation. In that case, the court concluded that it was not in accordance with law for the ITA to restrict application of the special rules only to fair-value investigations.

The defendant, disagreeing with that decision, contends that those rules are inapplicable herein because a party subject to an antidumping-duty order is on notice that its prices will be monitored thenceforth. That argument was addressed at length in *Industrial Quimica*, 13 CIT at ___, 729 F.Supp. at 109-14, and *stare decisis* counsels reliance on the court's reasoning in this action. *See, e.g., Krupp Stahl A.G. v. United*

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[16] In 1988, the regulation provided:

> (b) *Special rules for fair value investigations.* For purposes of fair value investigations, manufacturers, exporters, and importers concerned will be expected to act within a reasonable period of time to take into account price differences resulting from sustained changes in prevailing exchange rates. Where prices under consideration are affected by temporary exchange rate fluctuations, no differences between the prices being compared resulting solely from such exchange rate fluctuations will be taken into account in fair value investigations.

This provision was subsequently superseded by 19 C.F.R. § 353.60(b). *See* 54 Fed. Reg. 12,742, 12,789 (March 28, 1989).

States, 15 CIT Slip Op. 91-31 (April 19, 1991), and citations therein. As for notice, it can be expected that those covered by an antidumping duty order will factor their expectations as to future rates of exchange into their pricing. And it is rational to presume that during subsequent administrative review currency adjustment perceived as necessary has already been made.

This being a presumption however, it is rebuttable. As stated in *Industrial Quimica*, "[i]f a factor is truly beyond the control of the exporter, [it] cannot, by definition, make adjustments to compensate. The rationale of the special rule, then, should apply whether the proceeding is a dumping determination or a subsequent review." 13 CIT at ___, 729 F.Supp. at 112. *See also Melamine Chemicals, Inc. v. United States,* 732 F.2d 924, 933 (Fed.Cir. 1984). In other words, that parties to a review are presumed to have been on notice is not a valid reason not to consider whether exchange rates were in fact beyond their ken. On the other hand, this does mean that the ITA must make an adjustment every time a claim therefore is raised. Claimants have to demonstrate on the record that the exchange-rate behavior was beyond their ability to compensate. *See, e.g., id.* and *Budd Company, Wheel & Brake Div. v. United States*, 14 CIT ___, ___, 746 F.Supp. 1093, 1100 (1990). *Cf. Luciano Pisoni Fabbrica Accessori instrumenti Musicali v. United States*, 10 CIT 424, 430, 640 F.Supp. 255, 260 (1986).

The plaintiffs refer, for example, to a report that the United States, Japan, West Germany, France and the United Kingdom were going to act in concert "to drive the dollar down". Plaintiffs' Memorandum, p. 41, citing The New York Times, Sept. 23, 1985, at A1, col. 6. Such an announcement appears, however, to add to, not lessen, the burden of demonstrating an inability to contemplate exchange rates as they developed. Nevertheless, the plaintiffs claim to have been under binding contracts with set prices.

Of course, parties are free to contract as they see fit, but their arrangements are still governed by the trade laws, and unfulfilled expectations may not be grounds for adjustment, although the court notes in passing that the ITA has been responsive to settlement of expectations in advance of sale. *E. g., Antifriction Bearings From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,085-86 (May 3, 1989). There, the agency allowed a circumstance-of-sale adjustment upon a demonstration of the exchange rate projected in a forward hedging contract. The prices considered therein were shown to have been directly related to a rate certain. Be that as it may, suffice it to state for the moment that the plaintiffs are entitled to an opportunity to attempt to persuade the ITA of circumstances beyond their contemplation and for which adjustment would be appropriate. In granting remand to provide such an opportunity, it is useful to recite *Industrial Quimica del Nalon, S.A. v. United States*, 13 CIT at ___, 729 F.Supp. at 114:

> * * * The Court trusts that upon remand, ITA will redetermine whether dumping margins in the instant case arose from a

temporary or sustained shift in currency exchange rates, and whether application of the special rule or some other form of adjustment is called for under either circumstance.

IV

The plaintiffs also complain that the full amount of a claimed rebate was not deducted in the foreign-market-value calculations for the 1984-85 and 1985-86 review periods. *Compare* Intervenor-Defendant's Memorandum, p. 55 *with* Plaintiffs' Response, p. 46. On its part, the defendant maintains that it "deducted from foreign market value all rebates to home market customers, including the dealers period rebate, reported by Brother." Defendant's Memorandum, p. 54. *See generally Id.* at 54-56. *See also* 53 Fed. Reg. at 40,937, *Comment 83*.

However, this position is not supported by substantial evidence on the record. As the plaintiffs point out, their claim was verified by the ITA[17], but the adjustments do not appear as claimed in the agency's computer printouts for the final foreign market-value calculations. *See also* Plaintiffs' Confidential Memorandum, Attachment 12. The problem resulted from a computer programming error or from plaintiffs' failure to put the rebate figures onto the computer tape. In either event, the plaintiffs spotted the problem at the first available opportunity (upon release of the ITA's preliminary computer print-outs) and brought the matter promptly to the agency's attention, ConfDoc 161, p. 59. *Cf. Koyo Seiko Co. v. United States* and *Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce, supra*. The ITA agreed that a deduction for the dealers' period rebates had been omitted and stated that it had "made the appropriate adjustments to FMV for the final results." 53 Fed.Reg. at 40,937. *Cf.* ConfDoc 151, p. 3. If, as appears, this is not the case, the full amount of the rebates should be deducted during remand.

V

The defendant agrees with the plaintiffs that the final determination contains a number of other ministerial errors supporting remand for correction. However, in some instances the defendant disagrees that relief should be tailored in the form the plaintiffs request, while the intervenor-defendant opposes remand for various reasons.

Due to the tripartite nature of a case like this, remand is not the automatic result of government acquiescence therein. *See, e.g., Smith Corona Corporation v. United States*, 11 CIT 954, 678 F.Supp. 285 (1987).

A

The ITA apparently agrees that its determination-contains double deduction of plaintiffs' corporate advertising expenses for each review period. The correct approach upon remand, the plaintiffs assert, would be to treat those expenses as indirect, as claimed in their questionnaire

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[17] *See* ConfDoc 90, p. 8.

responses[18]. The defendant contests such treatment on the ground that it was not pressed below and is being raised here for the first time. That is, in verifying the questionnaire responses, the ITA determined that the expenses in question were direct, but it then proceeded to take them into account twice, once as part of corporate overhead and once as separate, direct. It is this mistake which the defendant offers to rectify.

The doctrine of exhaustion requires that an administrative agency have been presented with an opportunity to pass upon an issue first.[19] In *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed.Cir. 1990), for example, the plaintiff had attempted to claim in court for the first time that, since selection of the best information otherwise available was at issue, the court could consider whether data underlying the ITA's selection should be updated to account for changes in interest and exchange rates for the French franc up to the review period. The court of appeals affirmed the Court of International Trade's dismissal of the attempt on the ground of failure to exhaust, noting that the plaintiff had not disputed the CIT's conclusion that the claim had not been presented for agency consideration "for tactical reasons". *Id.* at 1191. On the record here, it cannot be said that plaintiffs' challenge to the ITA's treatment is of the same ilk, but, on the merits, the agency's policy apparently is to treat general advertising as an indirect expense and product-specific advertising as direct. *E.g., Certain Internal-Combustion, Industrial Forklift Trucks From Japan*, 53 Fed.Reg. 12,552, 12,568 *Comment 38* (April 15, 1988); *Television Receiving Sets, Monochrome and Color, From Japan, supra. See N.A.R., S.p.A. v. United States*, 13 CIT ____, ____, 707 F.Supp. 553, 560 (1989).

The ITA found advertising in the record which references specific PETs. Its verification report for the 1985-86 period, for example, indicates an extensive examination of the expenses in question, finds numerous references therein to specific models, and concludes:

> * * * We were not satisfied that the advertising costs incurred under the heading "Corporate" in BIC's Monthly Profit Center Report were advertisements simply marketing Brother as a company, consumer group or seller of typewriters.

ConfDoc 110, p. 18. Against this conclusion, and in light of the underlying facts on the record, substantial ground to order the claimed expenses treated as indirect upon remand is not evident. Ergo, only the agency's double deduction need be remedied.

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[18] ConfDoc 2, pp. 10, 12 (1982-83); R.Doc 29, pp. 10, 12 (1983-84); ConfDoc 4, p. 12 (1984-85) (*see* Amended Index and Defendant's Exhibit 36); R.Doc 161, p. 12 (1985-86).

[19] *See Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action"). *See also Hormel v. Helvering*, 312 U.S. 552, 556-57 (1941):

> Ordinarily an appellate court does not give consideration to issues not raised below. * * * There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.

B

The construction of values[20] for Brother L10+3, XL20+3 and XL80 PETs for the 1983-84 review period entailed no direct expenses and deduction of an incorrect amount for indirect expenses. The defendant consents to remand to consider plaintiffs' contention that it should have adjusted for certain direct expenses, as well as to correct the amount deemed indirect. The intervenor-defendant argues that remand is not warranted because (1) it is inappropriate to deduct direct and indirect expenses from values constructed for models sold in the United States based upon a home-market model and (2) the plaintiffs did not bear their burden on the issue during the administrative proceedings. However, the court agrees with the plaintiffs that these points are premature and simply notes for now that, when foreign-market value is constructed, the ITA may properly make adjustments for differences in circumstances of sale. *E.g., Timken Co. v. United States*, 11 CIT 786, 796-99, 673 F.Supp. 495, 506-09 (1987).

C

It has been agreed that (1) packing expenses were added twice in the values constructed for models L10+3, XL20+3 and XL80 for the 1983-84 review period; (2) certain purchase-price sales were counted twice in the margin calculations; and (3) certain positive sales transactions were erroneously included in the ITA's home-market data base, as indicated in Attachment 11 to plaintiffs' memorandum. The intervenor-defendant opposes remand of these issues on the ground that the errors' effect upon the dumping margins was *de minimis*.

Again, however, where remand is otherwise necessary, it is appropriate to correct clerical errors even though the result thereof may be insignificant[21], for determination of margins as accurately as possible is a fundamental concern of this kind of case. Accordingly, the court agrees with the defendant that correction of the erroneous deductions should be made.

D

All of the parties agree that a computer programming error caused an erroneous exporter-sales-price ("ESP") offset adjustment figure to be used in the dumping margins. The plaintiffs list "the known page and OBS numbers on the ITA's ESP printouts" where the erroneous adjustments appear and also request correction for any other OBS numbers where an incorrect ESP offset was used. Plaintiffs' Memorandum, pp. 75-79. The defendant and the intervenor-defendant desire to limit remand to correction of the observations as identified now by the

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[20] Constructed value includes the cost of materials and fabrication, general expenses and a reasonable profit, and the cost of containers and other expenses incidental to readying the merchandise for shipment to the United States. 19 U.S.C. § 1677b(e).

[21] *See, e.g., Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce*, 12 CIT 825, 834, 696 F.Supp. 665, 673 (1988).

memorandum.[22] The plaintiffs respond that they may not have identified all of the mistakes and consequently request that the remand direct that all transactions where an erroneous ESP offset was used be corrected, rather than limit remand solely to those in their memorandum.

The court, however, considers such an approach too broad at this time. It may well be that, if the computer programming error is rectified, all of the resultant errors to which plaintiffs allude will be corrected. When the programming is corrected, if ESP offset errors nevertheless remained[23], it would then be incumbent upon the plaintiffs to provide particulars so that the court could consider appropriate relief.

E

The plaintiffs further allege, and the defendant agrees, that incorrect currency conversion rates and foreign-market values were used in the purchase-price margin calculations for all four review periods. The intervenor-defendant opposes remand on the ground that its examination of the record reveals that "Brother failed to overcome the presumption that the date of sale was the shipment date." Intervenor-Defendant's Memorandum, p. 53. The plaintiffs counter that this contention is "rebuffed by the Government's concession that a remand is appropriate to correct the error, implying that Brother did 'establish to the ITA's satisfaction that the sales were fixed on the contract date as reported.'" Plaintiffs' Response, p. 44. This court concurs. The intervenor-defendant further argues that,

> even assuming Brother had established entitlement to the use of contract dates as the date of sale, it failed to call attention to the fact that the column headings contained in its sales listings were misnamed. At best, the use of "CONT DTE" to indicate the sales date, and "SALE DATE" to indicate the shipment date, was confusing. * * * In such circumstances, Brother has the burden of examining ITA's treatment of such sales for purposes of a preliminary determination and of calling attention to any error before the final determination is issued.[24]

In response, the plaintiffs assert that their questionnaire response instructions were clear. The issue is clouded somewhat by the defendant's concurrence that plaintiffs' selection of headings was not a model of

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[22] The intervenor-defendant implies additionally that remand is not necessary since the plaintiffs have identified but a few, which, it claims, would only result in a *de minimis* adjustment to the margin. For the reasons already stated, however, it would be inappropriate not to make ministerial corrections, even if *de minimis*, where remand is otherwise called for.

[23] *Cf.* Plaintiffs' Response, p. 42 ("It is not clear why application of the 90-60 day rule or changing the comparative home market model caused the computer to not pick up the INDIRECT field. In some instances, the computer picked up the correct INDIRECT figure but then seemingly ignored it in determining the INDHM").

[24] Intervenor-Defendants Memorandum, pp. 53-54, which proceeds to quote from *Asociacion Columbiana de Exportadores de Flores v. United States*, 901 F.2d 1089, 1093 (Fed.Cir.), *cert. denied*, 111 S.Ct. 136 (1990), as follows:

> That the Floramerica group can now show on appeal how a different ESP offset could have been calculated does not mean that the ITA's determination was not supported by substantial evidence when it was made. Under the regulations, the appellants had the burden of establishing their entitlement to the ESP offset. The ITA could take the appellants' February 5 submission for what it said and interpret it as setting forth the total ESP offset that Floramerica was claiming. The appellants should not be allowed to reconcile the ambiguities by rearguing their position when they had the opportunity to present their case unambiguously during the investigation. [emphasis deleted]

clarity, but, having agreed on the point, the defendant still acquieces in remand of the issue, which is granted.

F

The defendant and the intervenor-defendant agree that the ITA determination fails to deduct selling commissions from the foreign-market values for Brother Zorongo 11 and Electra 60 PETs for the 1982-83 period, and for the Wordshot for 1985-86. Nonetheless, the intervenor-defendant opposes remand on the ground the ITA was not required to make the requested deductions.

Here again, however, the court construes defendant's acquiescence as an indication that it has exercised its discretion in favor of making the requested adjustment.

VI

In view of the foregoing, plaintiffs' motion for judgment on the agency record must be granted in part. On those issues on which remand to the ITA for further proceedings not inconsistent with this opinion is hereby granted, the agency may have 60 days from the date hereof to conduct them and to report the results thereof to the court, whereupon the plaintiffs may have 30 days thereafter in which to respond, and the defendant and the intervenor-defendant may have 15 days to reply thereto.

On all other issues, plaintiffs' motion must be, and it hereby is, denied.

(Slip Op. 91–59)

XTC PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-06-00451

Plaintiff challenges the classification of its merchandise as a miscellaneous textile product not otherwise accounted for, and argues that the item should enter as a "printed globe."

Held: Plaintiff has overcome the presumption of correctness which attaches to a Customs classification and the imported Hugg-A-Planets are properly classifiable as printed globes under item 273.30, TSUS.

[Judgment for plaintiff.]

(Dated July 12, 1991)

Sandler, Travis & Rosenberg (*Beth C. Ring* and *Barry M. Boren*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Nancy M. Frieden*) for defendant.

OPINION

TSOUCALAS, *Judge*: Plaintiff, XTC Products, Inc., ("XTC") brings this action to challenge the classification by the United States Customs

Service ("Customs") of its imported product under item 389.62 of the Tariff Schedules of the United States ("TSUS"), as a textile article not specifically provided for. Plaintiff seeks classification of the product, known as "Hugg-A-Planet," under item 273.30, TSUS, as a printed globe.

Background

Plaintiff was the importer of record of the subject merchandise, which entered the United States from South Korea in 1986. The merchandise as imported is a textile material with a map of the world printed upon it, and constructed so that when it is stuffed with polyurethane, it takes on a spherical shape. Customs classified the Hugg-A-Planet "skins" under a basket provision of the TSUS for miscellaneous textile products. Specifically, Customs classified the articles under section 389.62, TSUS, which reads as follows:

Articles not specially provided for, of textile materials:

Other articles, not ornamented:

Of man-made fibers:

Other:

Other:

This section carries a duty of 4 cents per pound plus 10% *ad valorem*. XTC claims that the Hugg-A-Planet should be classified under the *eo nomine* provision for printed globes, found at section 273.30, TSUS.[1] The parties stipulated that at the time of importation, goods imported from South Korea under this section were eligible for duty-free entry under the Generalized System of Preferences ("GSP"). *See* Pretrial Order at 4. Hence, if plaintiff prevails in this action, its goods may enter duty-free.

The court may review a classification by Customs following the denial of a protest filed pursuant to 19 U.S.C. § 1514 (1988). Plaintiff properly is before the Court following denial of its protest. The Court's jurisdiction is based on 28 U.S.C. § 1581(a).

Discussion

Customs' classification of imported merchandise is presumed to be correct. 28 U.S.C. § 2639(a)(1) (1988). Therefore, the importer challenging the classification bears the burden of showing the error of Customs' decision. *Id.; Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 787 (Fed. Cir. 1988), *cert. denied*, 488 U.S. 943 (1988). However, once the classification is contested, the court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

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[1] Item 273.30, TSUS, reads as follows:
Printed globes * * *

The threshold issue for the Court is whether the imported merchandise is a printed globe classifiable under the *eo nomine* provision or a miscellaneous textile product. Generally, an *eo nomine* designation is to "be preferred to terms of general description and to enumerations which are broader in scope and less specific." *U.S. v. Astra Trading Corp.*, 44 CCPA 8, 11, C.A.D. 627 (1956). General Headnote 10(c) of the Rules of Interpretation, TSUS, adds that an "article which is described in two or more provisions of this schedule is classifiable in the provision which most specifically describes it."

I. *Printed Globe:*

To determine whether the Hugg-A-Planet fits within the eo nomine provision for printed globes, the Court first must define the term "printed globe." The meaning of a tariff term is a question of law. *Digital Equipment Corp. v. United States*, 889 F.2d 267, 268 (Fed. Cir. 1989); *Converters Div. of Am. Hosp. Supply Corp. v. United States*, 861 F.2d 710, 712 (Fed. Cir. 1988). When determining the legal definition of a tariff term, the Court may rely upon the common and commercial meanings of the term as found in judicial authority and lexicographic materials. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). *See also Nippon Kogaku (USA), Inc. v. United States*, 69 CCPA 89, 92-93, 673 F.2d 380, 382 (1982); *A & A Int'l, Inc. v. United States*, 11 CIT 775, 778, 676 F. Supp. 263, 265 (1987).

Webster's Third New International Dictionary at 965 (1986), defines a globe as:

> a round *typically* hollow and metal ball that has a map of the earth drawn on it and that is *usually* set so as to be rotatable at an angle corresponding to the inclination of the earth's axis.

(Emphasis added.) The Second College Edition of the American Heritage Dictionary at 562 (1982), defines a globe as a "body with the shape of a sphere, *especially* a representation of the earth or heavens in the form of a hollow ball." (Emphasis added.) The Oxford English Dictionary, Second Edition, Volume VI, at 582 (1989), defines a globe as a "spherical structure on whose surface is depicted the geographical configuration of the earth (*terrestrial globe*), or the arrangement of the constellations (*celestial globe*)." These definitions, while providing a helpful guideline, pointedly are not exclusive of globes that are not hollow, metal or rotatable at an angle in conformity with the earth's axis.

Upon review of lexicographic and other sources, the Court finds that a proper legal definition of a globe is: A sphere with a reasonably accurate map of the earth printed upon it. Many variations of the typical globe exist, particularly in terms of component materials since globes may be made of metal, glass, plastic or, as in this case, a textile fabric. However, this general definition suffices for the Court's purposes.

The Hugg-A-Planet, as sold, is a sphere composed of a textile material of cotton and polyester, and stuffed with polyurethane. Printed upon the textile "skin" is a reasonably accurate map of the world. It appears to

be printed to scale and it delineates continents, countries and major bodies of water.

At trial, plaintiff presented four witnesses who testified that the Hugg-A-Planet is used as a globe, that is, it is used to inform and educate people as to the geography of the earth. The government produced no witnesses in rebuttal. The use to which a product is put is relevant because the primary function of an item governs its classification. *A & A Int'l*, 11 CIT at 785, 676 F. Supp. at 270.

Plaintiff's first witness was Linda Lantieri, the director of the Resolving Conflict Creatively Program of the Division of Professional Development for the New York City public schools. Ms. Lantieri testified that the Hugg-A-Planet is used as an educational tool in the New York City public school system. She also stated that she worked with the product in educational programs in Alaska, Arkansas and Louisiana, and that the product was used to teach children about geography. Ms. Lantieri added that the printing on the Hugg-A-Planet is not incidental to its use because if a map of the world were not printed on it, she would not have purchased it for use in the school system. The second witness, Maria Stanof Haritopoulos, the store manager for Rand McNally in New York City, testified that the product is sold and marketed as a globe in the globe department of her store.

Robert Forenza, the president of XTC, testified as to the process for manufacturing the Hugg-A-Planet. He stated that there are over six hundred identifiable features on the globe and each is depicted accurately and to scale. Finally, Patricia Howard, the vice president for marketing of XTC, testified that the printing and geographical configurations are updated with each reprinting to add detail and account for geo-political changes.

The government has gone to great lengths in attempting to prove that the Hugg-A-Planet is not a globe because it is used by some purchasers and is advertised by some retailers, as a toy, pillow or ornament. Defendant cites to Headnote 1 of Schedule 2, Part 5 of the TSUS, under which is the printed globe classification. That headnote states that this part covers only printed matter, and "does not cover any article in which printing is merely incidental to the primary use of the article or in which printing is employed mainly for coloration or to produce a decorative or novelty effect." However, the fact that a globe is used as a toy, pillow or ornament does not change its essential character if it fits the definition of a globe. The functions of any globe are manifold. For instance, a globe with gold trim and interior illumination is still a globe, even though it is likely to be used for decorative purposes. Similarly, the fact that the Hugg-A-Planet is soft and squeezable does not change its fundamental character. Plaintiff's witnesses demonstrated that the printing on the Hugg-A-Planet is not incidental to its use as a globe. If not for the printing of a map of the world, it could not be used by the educational program directed by Ms. Lantieri, or sold in the globe department of the store managed by Ms. Haritopoulos. Therefore, the printing imparts the

essential character of the product and Headnote 1 does not preclude classification of the Hugg-A-Planet under item 273.30, TSUS. *See Dominion Ventures, Inc. v. United States*, 10 CIT 411, 413 (1986).

Upon review of the testimony of plaintiff's witnesses, and of the product itself, the Court finds that the Hugg-A-Planet is a printed globe. It is spherical and has a reasonably accurate map of the world printed upon it. In addition, it is primarily used as an instrument of geographical information. Hence, it fits within the legal definition of a globe.

II. *Condition as Imported:*

However, the Hugg-A-Planet is not imported in spherical form. The imported merchandise is the hollow and folded "skin" of the finished product. While the map of the earth is imprinted thereon and the "skin" is sewn in such a manner that when stuffed it acquires a globular shape, it is not spherical, or stuffed, when imported. Therefore, the government contends, the merchandise as imported cannot be classified as a printed globe. Plaintiff counters that, in its condition as imported, the product is an unfinished globe, eligible to enter under the classification for the finished product.

It is well established that an imported article is to be classified according to its condition as imported, not its condition as sold. *Simod*, 872 F.2d at 1577; *Carrington Co. v. United States*, 61 CCPA 77, 81, C.A.D. 1126, 497 F.2d 902, 905 (1974); *United States v. Baker Perkins, Inc.*, 46 CCPA 128, 131, C.A.D. 714 (1959). The Court having determined that the finished product is a globe, the issue then becomes whether the Hugg-A-Planet skins constitute unfinished globes or parts of globes.

If they are parts of globes, they cannot enter under the *eo nomine* provision because "a tariff provision which does not specifically provide for parts does not include them," and item 273.30 does not provide for parts. *Glass Prods., Inc. v. United States*, 10 CIT 253, 255, 641 F. Supp. 813, 814 (1986); see also *United States v. Bruckmann*, 65 CCPA 90, 94, C.A.D. 1211, 582 F.2d 622, 625 (1978). But if the merchandise as imported is an unfinished, or substantially complete globe, then it may enter under the *eo nomine* provision, since parts of an article which, when assembled, "result in a substantially complete article" may be classified as the finished article. *Authentic Furniture Prods., Inc. v. United States*, 68 Cust. Ct. 204, 213, C.D. 4362, 343 F. Supp. 1372, 1379 (1972), *aff'd*, 61 CCPA 5, C.A.D. 1109, 486 F.2d 1062 (1973); *Daisy-Heddon, Div. Victor Comptometer Corp. v. United States*, 66 CCPA 97, 101, C.A.D. 1228, 600 F.2d 799, 802 (1979).

Our appellate court enumerated several factors to be considered by the courts when determining whether an imported article is substantially complete. *Daisy-Heddon*, 66 CCPA at 102, 600 F.2d at 803. Those factors are:

> (1) comparison of the number of omitted parts with the number of included parts; (2) comparison of the time and effort required to complete the article with the time and effort required to place it in its imported condition; (3) comparison of the cost of the included

> parts with that of the omitted parts; (4) the significance of the omitted parts to the overall functioning of the completed article; and (5) trade customs, *i.e.*, does the trade recognize the importation as an unfinished article or as merely a part of that article.

In selecting these factors, the court stressed that the list is not exhaustive and "fewer than all of the above factors, or additional factors, may come into play depending on the particular importation." *Id.*

Defendant contends that the imported skins are not substantially complete because they lack "the stuffing and additional processing required to transform the fabric skins into the shape necessary to make it identifiable as a globe." *Post-Trial Brief of Defendant, the United States* at 13. In support of this contention, the government cites to *Jack Schaefer, Inc. v. United States*, 11 Cust. Ct. 78, C.D. 798 (1943), wherein our predecessor court found that imported football casings could not be classified as footballs since they lacked the inner bladder. The court found that neither the casing nor the bladder, by itself, constituted an unfinished football because both were necessary to create a football. 11 Cust. Ct. at 79-80. Therefore, the casings were classified as manufactures of leather.

The Court finds that the reasoning in *Jack Schaefer* cannot be applied to the case at bar since it has been repudiated by the appellate court's doctrine of substantial completeness. In *Daisy-Heddon*, the Court of Customs and Patent Appeals specifically rejected the notion that the determination that a product is substantially complete must turn "on the presence or absence of an 'essential' part." 66 CCPA at 102, 600 F.2d at 803. The court explained that an analysis of substantial completeness must encompass several factors, not just whether an essential component of the finished product is present or not. *Id.*

A case in point was *Channel Master, Div. of Avnet, Inc. v. United States*, 856 F.2d 177 (Fed. Cir. 1988), wherein our appellate court considered the classification of imported solid state scanners which, upon the insertion of one or more crystals, received radio frequencies. The importer argued that, without the crystals the scanners could not operate as radios, thus they could not be classified as radio receivers. The court disagreed, asserting that the absence of an essential item was not sufficient to avoid classification as the finished article, provided the imported product constituted a substantially complete article. 856 F.2d at 179. Since the scanners did comprise substantially complete radio receivers, the court held that even without the essential crystals, the imported articles were classifiable as radio receivers.

Applying the *Daisy-Heddon* factors to the case at bar, the Court finds that as to the first factor, a comparison of the number of omitted parts with the number of included parts, there is no difference. One part is included (the skin) and one part is omitted (the stuffing).

The second factor is how the time and effort required to complete the article compares with the time and effort expended to place it in its imported condition. The testimony of Mr. Forenza and Ms. Howard, and

an examination of the evidence, clearly indicate that a great deal of time and effort is spent creating the globe skins. The cloth first is "screenprinted" with the multicolored map configurations, and then modified, if necessary, to correct inaccuracies or to reflect geo-political changes. The fabric then is cut to a unique "orange-peel" shape and sewn in such a way that when later stuffed it assumes a spherical shape. After importation, the product is stuffed through a small hole near the bottom of the globe which is then sewn closed. Since a great deal more time and effort is spent to place the product in its imported condition than is spent after importation, this factor indicates that the Hugg-A-Planet, as imported, is a substantially complete printed globe.

The third factor is the cost of the processes prior to importation versus the cost of post-importation operations. Plaintiff submitted no information on relative costs based on a mistaken belief that this factor is irrelevant because "the nature of the stuffing does not change the essential character of the article as a globe." *Post Trial Brief of XTC Products, Inc.* at 21. Whether or not the *nature* of the stuffing is critical does not have bearing on the issue of relative costs. The fact is the Hugg-A-Planet is stuffed with polyurethane, which costs something. Although it seems the post-importation costs likely are less than the costs necessary to create the skins, the Court cannot consider this factor since no evidence was submitted.

The fourth factor is the significance of the omitted parts to the overall functioning of the completed article. Plaintiff argues that this factor also is irrelevant because regardless of what the product is stuffed with, the Hugg-A-Planet is a globe. Plaintiff is half-right, in that the *type* of stuffing is irrelevant, but the fact is it must be stuffed with *something* in order to be a globe. Given that the printing of the map of the earth imparts the essential character of the product, the Court finds that the omitted part is less significant than the included part of the Hugg-A-Planet. As a result, this factor also weighs in plaintiff's favor.

The last factor is trade customs, that is, whether the trade considers the importation to be an unfinished article or a part of the article. Aside from the testimony of XTC's own president and vice president for marketing, there was no evidence of what the commercial attitude is about the imported Hugg-A-Planet. Hence, this factor may not be regarded as being in plaintiff's favor.

Upon review of the *Daisy-Heddon* factors as applied to the facts of this case, the Court finds that the Hugg-A-Planet skins constitute substantially complete globes since the time and effort expended to create the skins greatly exceeds that of the processing performed after importation. While the stuffing is necessary to give the Hugg-A-Planet a globular shape, the Court finds that the stuffing is a relatively trivial operation compared to the processing which takes place in South Korea. Thus the Court finds that these factors outweigh the fact that no evidence was submitted to show relative costs or trade customs, and the

imported merchandise should be classified as a printed globe under item 273.30, TSUS.

Furthermore, an independent review of the government's classification of the Hugg-A-Planet as a miscellaneous textile article demonstrates that it cannot stand because the product is clearly more than just a textile article. Merchandise which constitutes "more than a particular article or which has additional nonsubordinate or coequal functions is not classifiable as that article." *Digital Equipment*, 889 F.2d at 268; *see also A & A Int'l*, 11 CIT at 784, 676 F. Supp. at 269. The subject merchandise unquestionably is "more than" a textile material, in that it has specific educational and informative uses which are exclusive to a printed globe and not subordinate to its function as a textile article.

CONCLUSION

Accordingly, the Court holds that the government's classification fails both independently and in comparison to the importer's alternative. The Court having found that plaintiff has overcome the presumption of correctness which attached to Customs' classification, judgment shall be entered in favor of plaintiff and Customs is ordered to reclassify the subject merchandise as a printed globe under item 273.30, TSUS.

(Slip Op. 91–60)

SMITH CORONA CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88-11-00866

OPINION AND ORDER

[Plaintiff's motion for partial judgment on the agency record granted in part and denied in part; remanded to the International Trade Administration.]

(Decided July 12, 1991)

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Todd C. Fineberg*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General: *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jane E. Meehan*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Pamela A. Green*), of counsel, for the defendant.

Tanaka Ritger & Middleton (*H. William Tanaka* and *Patrick F. O'Leary*) for intervenor-defendants Brother Industries, Ltd. and Brother International Corporation.

McDermott, Will & Emery (*R. Sarah Compton* and *David J. Levine*) for intervenor-defendant Nakajima All Co., Ltd.

AQUILINO, *Judge*: The plaintiff has interposed a motion for partial judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Portable Electric Typewriters From Japan Final Results of Antidumping Duty Administrative Review*, 53 Fed.Reg. 40,926 (Oct. 19, 1988). As

indicated, the review was carried out under the aegis of an antidumping-duty order for portable electric typewriters ("PETs") from Japan[1] and covered the years May 21, 1982 to May 20, 1983, May 21, 1983 to May 20, 1984, May 21, 1984 to April 30, 1985, and May 1, 1985 to April 30, 1986. It resulted in dumping margins for those respective periods of 0.62, 0.32, 0.44 and 4.00 percent for PETs manufactured by Brother Industries, Ltd. ("BIL").

BIL and its subsidiary Brother International Corp. ("BIC") have been participants in those review proceedings and brought an action of their own, CIT No. 88-11-00860, challenging the results thereof. Their motion for judgment on the agency record, which has been partially resolved *sub nom. Brother Industries, Ltd. v. United States*, 15 CIT ___, Slip Op. 91-58 (July 12, 1991), caused the plaintiff to file its motion for partial judgment on the same record per the following rationale:

> * * * In that action [No. 88-11-00860, both the defendant, International Trade Administration (ITA) and Smith Corona have conceded that certain errors were committed in the underlying agency determination that require a remand. Accordingly, this motion for partial judgment on the agency record is addressed specifically to those issues that Smith Corona wishes to pursue concerning the determination with respect to Brother. Should this Court determine in this action, too, that ITA erred, Smith Corona believes that the most efficient approach would be to remand all issues from both court actions simultaneously for consideration by the agency.[2]

Those issues, as articulated in the motion, are:

1. Whether ITA's conclusion that advertising expenses incurred by Brother as the "Official Typewriter of the Olympic Games" were "devoted exclusively" to Brother's EM-series office typewriters was supported by substantial evidence?

2. Whether ITA applied an improper legal standard, unsupported by its own regulations and precedent?

3. Whether, even assuming that the "Official Typewriter of the Olympics" was limited to promotion of office typewriters, a portion of the advertising expenses should have been allocated to portable electric typewriters sold by office equipment dealers?

4. Whether pursuant to 19 U.S.C. § 1677e(b)(3) ITA should have verified the allegation by Brother that no expenses were incurred during the period under review with respect to Brother's sponsorship of the 1988 Olympic Games?

5. Whether ITA properly adjusted foreign market value and U.S. price on account of credit costs incurred by Brother in the U.S. market, where ITA relied upon annual average credit costs submitted by Brother notwithstanding that the record established that credit terms were higher

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[1] *See* 45 Fed. Reg. 30, 618 (May 9, 1980).

[2] Plaintiff's Memorandum of Points and Authorities in Support of Partial Judgment on the Agency Record, p. 2, n. 2.

than average during three discrete promotional periods each year and varied by customer and period?

Jurisdiction of the court is pursuant to 28 U.S.C. § 1581(c).[3]

I

This court may not substitute its own judgment for that of the ITA even though it could come justifiably to a different conclusion had the court the burden of reviewing the matter *de novo*. *Ipsco, Inc. v. United States*, 13 CIT ___, ___, 710 F. Supp. 1581, 1583 (1989), *aff'd in part, rev'd in part* 899 F.2d 1192 (Fed.Cir. 1990), citing *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed.Cir. 1986), and *American Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F.Supp. 1273, 1276 (1984), *aff'd sub nom. Armco Inc. v. United States*, 760 F.2d 249 (Fed.Cir. 1985). The standard of review is whether the agency determination is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B). The record is to be reviewed for "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938).

A

Here, the ITA verified Brother questionnaire responses for the 1985-86 or sixth-review period. *See* Confidential Record Document ("ConfDoc") 110. Thereafter, the petitioner alluded anew[4] benefits to Brother's U.S. PET sales arising out of the sponsorship of the Olympic games and requested further investigation as to effect upon domestic prices.[5] The ITA thereupon directed the petitioner's suggested questions on the matter to Brother. *See* R.Doc 379. *See also* R.Doc 349.

Brother's response indicated that it had acquired a license on April 27, 1982 from the Los Angeles Olympic Operating Committee ("LAOOC") to promote typewriters generally and worldwide. The plaintiff claims, nevertheless, that advertising expenses for the 1984 games began "accruing" as early as royalty payments made in January 1981.[6]

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[3] The plaintiff has offered to supplement its motion papers with oral argument, but the quality of those papers, and of those submitted in opposition, obviates any need for such further explication.

[4] In *Portable Electric Typewriters From Japan; Final Results of Antidumping Duty Administrative Review*, 52 Fed.Reg. 1,504, 1,509 (Jan. 14, 1987), the ITA had determined that, insofar as U.S. sales of Brother's PETs were concerned, 1984 Olympics sponsorship expenses were "devoted exclusively" to products outside the scope of the antidumping duty order, namely, Brother office typewriters. Smith Corona claims to have challenged that finding in CIT No. 87-10-00157 but then to have abandoned the issue due to the insignificant amount of Olympics advertising expenses incurred by Brother during the period under review; "however, it does not concede that the determination by ITA was correct." Plaintiff's Memorandum, p. 6, n. 3.

[5] Record Document ("R.Doc") 340. *See also* ConfDoc 125. Section 1677a(e)(2) of Title 19, U.S.C. requires that exporter's sales prices be reduced for "expenses generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise". The governing regulation states that adjustments for differences in the circumstances of sales in the comparative markets will be allowed

> to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences. Differences in circumstances of sale for which such allowances will be made are limited, in general, to those circumstances which bear a direct relationship to the sales which are under consideration.
>
> * * * Examples * * * [include the] assumption by a seller of a purchaser's advertising or other selling costs. * * * Allowances generally will not be made for differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of the merchandise * * *.

19 C.F.R. § 353.15(a) and (b) (1988).

[6] Plaintiff's Memorandum, p. 36, citing R.Doc 392, Attachment 5, answer to question 1.

In either event, after the license issued, Brother expended increasing amounts, using 1984 Olympics symbols, to promote typewriters in Japan and overseas, some of which[7] were accounted for in the pricing of PETs sold in the United States. That accounting is not being challenged here. However, the response also indicated that BIL did not include newspaper, magazine and billboard advertising expenses in calculating costs allocable to U.S. PET sales

> since all magazine, newspaper and billboard advertisements depict an EM series office typewriter. As such these advertisements are not generic office typewriter advertisements and, according to the policy enunciated during the December 14, 1987 meeting, not allocable to [those] sales. * * *
>
> We advertise "Electronic Office Typewriters" with the Olympic Mark both in the U.S. and Japan. Samples of all types of Olympic advertisements are attached. These advertisements are inserted in magazine[s], newspaper[s], etc. in order to promote our electronic office typewriters.

ConfDoc 132, pp. 19, n. 1 and 20.

Prior to publication of the preliminary results, the petitioner argued that the 1984 Olympics advertising expenses were "attributable to typewriters used in offices and, as such, should be allocated *at a minimum* to sales of all typewriters sold by Brother for use in the office including the so-called 'compact office' PETs within the scope of the antidumping duty order." ConfDoc 134, p. 7 (emphasis in original). Apparently, the preliminary results included ITA agreement in the form of an adjustment to the exporter's sales prices of certain PET models sold through office equipment dealers. At the subsequent hearing, the petitioner argued, among other things, that expenses for all advertisements displaying "Official Typewriter of the Olympics" should be allocated to all sales. Brother countered that the 1984 Olympics advertising was not related to PETs but to other products and that deduction of the expenses would be contrary to agency practice in other proceedings[8] and also "an abrupt reversal" of the treatment of those expenses in the preceeding review determination. The contention apparently proved convincing, as the ITA explained:

> * * * We disregard advertising expenses when such expenses *are incurred exclusively* for models outside the scope of that order. In the previous review, we determined that Brother's 1984 Olympic advertising campaign was devoted exclusively to Brother's EM-series office machines. SCM has not submitted convincing evidence that Brother's PET models directly benefited from the Olympic advertisements. Furthermore, it would be inappropriate to allocated

[7] Specifically, they were for donations of manual and office typewriters to LAOOC, royalties, television commercials, promotional items, customer entertainment, and the operation of a press center and promotional booth. The promotional items, which were distributed worldwide, consisted of stickers, paper bags, envelopes, wrapping paper, T-shirts, "trump cards", tie-pins and stuffed dolls bearing the Olympics logo.

[8] 53 Fed.Reg. at 40,927, citing *Color Picture Tubes From Japan*, 52 Fed.Reg. 44,171 (Nov. 18, 1987); *Television Receiving Sets, Monochrome and Color, From Japan*, 50 Fed.Reg. 24,278 (June 10, 1985); *Color Television Receivers From Korea*, 49 Fed.Reg. 50,420 (Dec. 28, 1984).

[*sic*] some of these expenses, which have been determined to be attributable to Brother's office typewriters, to PET models simply because they are sold through OEDs. We consider the advertising to be related to particular products, not to a particular channel of distribution.[9]

B

The plaintiff restates the facts of record now at length. In question are eight styles of advertisement[10] which were run in magazines and newspapers and on a billboard in New York City's Times Square, copies of which have been appended to plaintiff's memorandum. The billboard depicted an EM-200 electronic typewriter frontally along with the words "Official Typewriter of the 1984 Olympic Games". The magazines and newspapers printed large-type messages a la

> "To strive towards excellence. To attain it. That's the spirit of the gold * * * and that's the spirit behind Brother" [Pattern 3];
>
> "History in the Making" [Pattern 7];
>
> "Gear-Up For The Olympics With Brother" [Pattern 8];
>
> "*brother* IS BETTER" [Pattern 6];
>
> "If it's the 'Official Typewriter of the Los Angeles 1984 Olympic Games' you know its quality, you know it's *brother*" [Pattern 1].

Most of these proclamations contained further blandishment in smaller-print, from which the plaintiff quotes the following:

> "Brother has justifiably been designated the official typewriter of the 1984 Los Angeles Olympic Games."
> "Brother strove towards excellence * * * and attained it." [Pattern 3]
> "The Olympics. For centuries the world's finest have periodically gathered for intense competition. * * * The Brother EM-200. Proudly taking its place among the best of the world as the official typewriter of the Los Angeles Olympic Games." [Pattern 7]
> "It's a fact * * * Brother is better."
> "No comparable typewriters provide more quality, features and value." [Pattern 6]
> "We could go on but our title says it all: 'Official Typewriter of the Los Angeles Olympic Games."' [Pattern 1]

Plaintiff's Memorandum, p. 19.

Such statements, the plaintiff contends, indicate that "an equally important theme" apart from promotion of the EM-series "was Brother's

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[9] 53 Fed.Reg. at 40, 927 (emphasis added). "OED" was said to be an acronym for Brother's office equipment division. However, the parties' papers relate the reference to "office equipment dealer(s)", a usage to which this opinion will defer.

[10] Brother apparently submitted six styles which were published in U.S. newspapers and magazines in response to the ITA's supplemental inquiry. Two other styles were also identified by the petitioner during the review proceeding. *See* Plaintiff's Memorandum, p. 8, citing R.Doc 340, Exhibit 5. Hereinafter, the first six advertisements will be referenced as indicated in plaintiff's memorandum *viz*. "Pattern 1", "Pattern 2", etc., and the two advertisements in Appendix 2 to that memorandum will be referenced as "Pattern 7" and "Pattern 8".

sponsorship of the Olympics—its status as a corporate 'good citizen.'" *Id.* at 17. It argues that promotion of the EM-series was actually the elevation of a "flagship" of an entire product line and that Brother's sponsorship extended to all of its machines, PETs as well as office typewriters. The plaintiff points to Brother's brochure commemorating its 50th anniversary and stating: "We're very proud and happy that *our typewriters* were chosen as the 'Official Typewriter of 1984 Olympics'". *Id.* at 16-17, citing R.Doc 340, Exhibit 2 emphasis added by plaintiff). It also relates excerpts from a number of authors on marketing to the effect that featuring a top-of-the-line product in advertising is a common method of promoting the entire line. The plaintiff claims that Brother was a recent entrant into the electronic office-typewriter market but had an established name for PETs; that the office typewriters are substantially similar to PETs in appearance, functions and features, all of which comprise one line of product; and that, in at least one instance of PET-specific advertising, the style used was identical to that of an Olympic advertisement which the ITA allegedly determined was devoted to an EM office typewriter, albeit without Olympic symbols. Additionally, the plaintiff asserts that the advertisements were placed in "nationwide mass media" like *Time, Newsweek, Sports Illustrated, Cosmopolitan, Los Angeles '84* and *Penthouse*; in 1982, seven of 20 advertisements were run in August and September coincident "with the traditional promotion of portable electric typewriters for back-to-school"[11]; in 1983, nine of 31 were run in those months; and, while Brother reported advertisements only through May 1984, the plaintiff discovered three (in two styles) which appeared in August and September of that year. *Id.* at 21, citing R.Doc. 340 at Exhibit 5. "The other period in which Brother's advertising clustered was April-May, another major marketing season for portable electric typewriters: 'Graduation/ Father's Day.'" *Id.* at 21. Finally, the plaintiff claims that the 1984 Olympic symbols were placed in proximity to PETs as part of purchase displays[12] and refers to its submission before the ITA containing the transcript of a commercial in which a dealer asserted that it

> featur[ed] the complete line of Brother Typewriters, the official typewriter of the Olympics. On display the state of the art Brother EM200, the typewriter that remembers. No comparable unit provides more quality and features. It's [*sic*] sixteen character display allows you to edit while you type, and the Brother EM200 interfaces easily with most computers.[13]

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[11] Plaintiff's Memorandum, p. 21, citing R.Doc 340 at Exhibit 5.

[12] *Id.* at 22. It reproduces a picture appearing in Brother's 50th anniversary commemorative booklet apparently taken at a Los Angeles showroom. *See id.*, Appendix 3, p. 7. Positioned around the showroom were typewriters, one of which was situated beneath a poster bearing the Olympic symbols. That display, the plaintiff claims, is of a portable electric typewriter, although the picture is ill-defined. The plaintiff also points to a May 6, 1983 New York Times article (page D1) with photograph encaptioned "salesman at 47th Street Photo in Manhattan, demonstrating a Brother electronic typewriter" to another individual. The demonstration is taking place on a countertop which bears two point-of-purchase displays depicting the Olympic symbols and 'Electronic Office Typewriters". *See id.*, Appendix 4.

[13] R.Doc 340, Exhibit 4. This exhibit bears the letterhead "Radio TV Reports, Inc." and other information pertaining to what appears to have been an actual broadcast.

C

To the extent that the plaintiff argues that such advertisements were corporate imaging, *Smith-Corona Group, Consumer Products Div., SCM Corp. v. United States*, 3 CIT 125, 540 F.Supp. 1341 (1982), *aff'd*, 713 F.2d 1568 (Fed.Cir. 1983), *cert. denied*, 465 U.S. 1022 (198), appears to be on point. Involving the same parties as this action, Smith Corona contested in that proceeding an adjustment to foreign-market value because "some of the advertisements made reference to Brother's commemoration of the production of its ten millionth typewriter, and therefore such advertisements were merely promoting Brother's corporate image." 3 CIT at 152, 540 F.Supp. at 1365-66. However, the Court of International Trade agreed with the ITA that

> those references do not constitute merely a "general image campaign", as urged by SCM. * * * [E]ach of the advertisements in question refers specifically to Brother's typewriters, either by words or by actual pictures. A "general image campaign", on the other hand, is more in the nature of making consumers aware of the company's concern for consumers and the quality of its workmanship and product in general, but does not tout a specific product. Where, as here, the particular product in question (*i.e.*, typewriters) is the sole subject of the advertisement, such advertisement does not lose its direct relationship to the sales of the product under consideration.

3 CIT at 152, 540 F.Supp. at 1366 (footnote omitted). In affirming, the court of appeals stated, 713 F.2d at 1581:

> * * * While the challenged ads were not exclusively directed to the relevant merchandise, a portion of each advertising effort was. In a purely metaphysical sense, Smith-Corona is correct in that the ad expense cannot be directly correlated with specific sales. Yet, the statute does not deal in imponderables.
>
> That portion of the advertising that featured portable electric typewriters was related to the expense of selling that merchandise. The presence of * * * institutional advertising in the same advertisement does not deprive the relevant portion of the advertisement of its direct relationship to the relevant sales.
>
> * * * In the absence of evidence to the contrary, the Secretary could reasonably conclude that the advertising expense was related to sales during the relevant period. Thus, we must uphold the Secretary.

Unlike the action at bar, the ITA had made the adjustment requested therein, despite Smith Corona's arguments to the contrary. Although the setting here is the reverse, the foregoing case governs. Even if the evidence that the advertisements contained institutional or corporate-image themes were substantial, it still would not undermine the agency's determination, for the existence of such themes in advertisements does not necessarily diminish direct promotion therein of particular product(s).

D

Another point the plaintiff presses is that the ITA determination allows the costs of the advertisements to circumvent the antidumping-duty order in that they promoted electronic typewriters generally.

It may well be that the ambit of such an order is ill-defined in terms of the marketplace. However, that is not the perspective of the court; the agency evaluation of the distinctions in that setting can only be reviewed on the basis of the record developed. And the ITA is presumed to have given appropriate consideration to everything brought to its attention and relevant to the issue. *See, e.g., Nakajima All Co., Ltd. v. United States*, 14 CIT ____, ____, 744 F.Supp. 1168, 1175 (1990); *Maine Potato Council v. United States*, 9 CIT 293, 301, 613 F.Supp. 1237, 1245, *appeal after remand*, 9 CIT 460, 617 F.Supp. 1088 (1985).

Here, the agency concluded that the expenses for the advertisements and displays were "incurred exclusively[14] for the promotion of office electronic typewriters and not for an entire product line. The defendant now adds:

> According to consistent agency practice, Commerce considers expenses for corporate advertising which is model-specific as expenses directly related to that product only ("directly related" expenses). * * * In this case, Commerce properly did not make an adjustment for the advertisements because they referred *only* to products which are not covered by the review—electronic office typewriters.

Defendant's Response, pp. 14-15 (emphasis in original).

According to the plaintiff, several advertisements did not mention the "EM-series" at all. However, of the eight in the record, only pattern 3 might be construed to support this allegation. Even then, it features a picture of three electronic typewriters with "*brother* Electronic Office Typewriters" centered below the picture in the largest type on the page. In regard to plaintiff's particular list of publications in which the advertisements appeared, the attempted inference is that their aim was at potential consumers of PETs. However, readers could just as readily have included potential purchasers of office machines. For instance, *The Office, PanAm Clipper, USAir Magazine, The Officer Magazine* and *The Office Technology* are publications in which the advertisements appeared and about which little mention is made. *See, e.g.*, ConfDoc 132. Furthermore, although the appearance of one-third of the announcements during one-sixth of the year under consideration may be statistically significant, there is nothing in the record from which to infer that office-equipment sales were unrelated to those periods.

The defendant claims that the "plaintiff ignores the logical reason for the timing of the Olympic advertisements—the Olympics Games occurred in late summer, 1984." Defendant's Response, p. 17. As the ITA decided, even if use of the Olympic symbols was cavalier, any benefits to

[14] 53 Fed. Reg. at 40,927.

PETs were, at best, tangential. The New York Times article, for example, discussed Brother's attempts to break into "the office market in the United States", the competitive environment for producing office typewriters, and the company's "growth in the office automation lines."

There is substantial evidence on the record in support of the agency's position. Each advertisement contained "Official Typewriter of the Los Angeles 1984 Olympic Games juxtaposed with one or more of the games' symbols and prominently featured the name "brother" in bold lettering, followed usually by the words "Electronic Office Typewriter" or "Electronic Office Typewriters" in proximity to a picture of one or more such machines. The model number of the one pictured was captioned on the side, invariably indicating the EM series, and/or a serial plate containing "EM" was visible above the keyboard. Most of the advertisements went into detail about particular features of the pictured machine(s) or the EM series generally. As for the billboard with the "Official Typewriter of the 1984 Olympics" language and symbols, the photograph submission upon which the ITA based its decision depicted an electronic typewriter frontally, the serial plate ("EM-200") of which was visible. In short, to have concluded that the exhibits were intended to promote electronic office typewriters exclusively is not without foundation.

The plaintiff contends nonetheless that the ITA reversed the burden of proof by requiring it to submit "convincing evidence that Brother's PET models directly benefited from the Olympic advertisements." Plaintiff's Memorandum, p. 28, quoting 53 Fed.Reg. at 40,927. In essence, it argues that the evidence of whether such advertisements benefited PETs was more likely in the respondents' hands, and they, not the petitioner, should have been required to disprove any benefit to PETs.

In weighing the information presented on both sides, the agency simply accepted the respondents' presentation as against that of the petitioner. This did not amount to an unlawful approach. Indeed, as the plaintiff itself states, "it would be difficult to show that an advertisement was actually a 'direct benefit' to sales of the merchandise advertised." *Id.* at 30. *Cf. Smith Corona Group, Consumer Products Div., SCM Corp. v. United States*, 713 F.2d at 1581 (In a purely metaphysical sense * * * the ad expense cannot be directly correlated with specific sales").

E

The plaintiff also takes the position that a portion of the advertising expenses should have been allocated to PETs sold by office equipment dealers. The defendant claims that "[any adjustment based upon an alleged 'spillover' effect from advertisements featuring only Brother electronic office typewriters (as opposed to PETs) would be based upon pure speculation." Defendant's Response, p. 18. Of course, such speculation cannot be the basis for adjustment. *Compare, e.g.*, 19 C.F.R § 353.15(b) (1988) (circumstance-of-sale adjustment not allowed unless "costs are attributable to a later sale of the merchandise") *with* 19 C.F.R § 353.15(a) (1988)(adjustments allowed if there is a "direct relationship

to the sales which are under consideration"). *But see* 19 C.F.R § 353.56 (1990). Be that as it may, on the record at hand, the court is unable to conclude that the ITA was required to make the allocation requested. That is, its refusal was in accordance with law and based on substantial evidence in the record.

II

The ITA verified the Brother responses to the general sixth-review-period questionnaires from March 2 to 13, 1987 pursuant to request and as required by 19 U.S.C. § 1677e. Thereafter, the petitioner repeated concern about Brother's advertising expenses in conjunction with the 1988 Olympics, and the ITA considered the matter of sufficient import to issue supplemental questions. The Brother response indicated that those games might involve PET-related advertising but claimed that the agreement to act as sponsor for 1988 was not concluded until March 31, 1987, and therefore no advertising expenses had been incurred in the period under review. The petitioner requested further verification. R.Docs 403, 410. The ITA declined, accepting Brother's claim, finding nothing suspect about it in itself and in light of the prior verification report(s) for BIC and BIL. *See* ConfDoc 151. The agency's final determination states:

> * * * The advertising expenses for this campaign will be considered in administrative reviews for subsequent periods. We are satisfied that Brother did not begin incurring the expenses until after the close of the period under review.

53 Fed.Reg. at 40,928.

A

The plaintiff argues that Brother's claim with regard to the sixth-review period is "unverified information * * * not substantiated by a copy of the agreement, and represents a bare, self-serving assertion that ITA should have given little weight." Plaintiff's Memorandum, p. 36. It contends that the ITA should have used the best information otherwise available or, at a minimum, verified the claim.

Brother asserts that the request to verify 1988 Olympics advertising was not only untimely, it was also so vague as to constitute a failure to exhaust administrative remedies. Allegedly, the petitioner initially requested only that the ITA explore "new issues" related to Olympics advertising in general and thereafter concentrated its requests for verification on Brother's 1984 expenses:

> * * * Not a word was said about the 1988 Olympic Games expenses.] * * * Smith Corona failed to ever raise non-verification of the March 31, 1987 [contract] date as an issue, failed to provide the ITA with the opportunity to make the first decision thereon, and failed to exhaust administrative remedies.

Brother Memorandum, p. 30.

However, the petitioner's October 9, 1987 submission did request an investigation of "all costs of sponsorship for both the 1984 and 1988

Olympics"[15] and also "that the agency verify all data submitted by Brother in response to this request."[16] That request was not so vague that the ITA was not presented with a proper opportunity to address the issue. The petitioner pointed out that: (1) Brother made royalty payments for 1984 Olympics sponsorship in January 1981 or prior to its official agreement with the LAOOC[17]; (2) for subsequent review proceedings Brother submitted sample advertisements of its sponsorship of both the summer and winter 1988 games depicting "manual compact electronic * * * [and] electronic office" typewriters[18]; (3) BIC reported that it had destroyed the promotional and advertising materials because they required too much space to store[19]; (4) Brother failed to report the two different styles of advertisements discussed above; and (5) Brother submitted an incomplete listing of purchase-price sales and subsequently tendered additional data untimely[20]. The Brother response, *id.* at 32-33, is that three of these points have

> nothing to do with errors or omissions [and] in no way detract from Brother's reliability or credibility. The two other items * * * deal respectively with 1984 Olympic advertisements and BIC's 1984-1985 purchase price sales. Smith Corona has not shown how these two isolated mistakes, unrelated to the March 31, 1987 date, create any doubt about the accuracy thereof.

Of course, the ITA must consider the record as a whole, including the results of any prior reviews which might bear on a present issue. *See, e.g., Nakajima All Co., Ltd. v. United States, supra.* The defendant asserts that, having already engaged in verification, it "was not required to conduct a second verification in order to verify the supplemental response." Defendant's Response, p. 22. Certainly, Congress intended to lessen the ITA's administrative burden by eliminating through section 618 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 3038, repetitious verification. Nevertheless, defendant's assertion conflicts with the plain language of the statute. Verification of all information relied upon in making a review determination is required by 19 U.S.C. § 1677e, and there is no dispute that the agency's determination relied upon the claimed lack of 1988 Olympics sponsorship expenses. While it is true, as the defendant points out that the petitioner requested Commerce to verify the supplemental response almost one year after verification of the 1985-86 review period had taken place, the record exhibits an opportunity to have done so which should have been pursued.

Verification tests the facts upon which conclusions are to be drawn and indicates whether they will reflect an acceptable degree of certainty. The defendant argues that to order verification in this case "would

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[15] R.Doc 349 at 2.

[16] *Id.* at 3.

[17] *See* R.Doc 392 at Attachment 5, answer to question 1.

[18] *See id.* at Attachment 6.

[19] *See id.* at Attachment 7, p. 6.

[20] *See* Plaintiff's Memorandum, pp. 37-38 and R.Doc 428.

deprive Commerce of its discretion to determine the amount of information which is adequate and sufficient for the purposes of the particular proceeding and would place an extreme burden upon the agency's resources." Defendant's Response, p. 24. Suffice it to state for the present that neither the ability of the agency to choose that which will satisfy it on the facts nor the limits of its resources are in doubt, only that the ITA does have a statutory obligation to properly verify those facts which it finds dispositive.[21]

B

Verification can be accomplished by various methods. The agency argues that it substantiated Brother's claim by noting the absence of conflicting information in prior verification of BIL's reported advertising and indirect expenses. Under such a circumstance, it argues, further verification was unnecessary, citing *Monsanto Co. v. United States*, 12 CIT 937, 947, 698 F.Supp. 275, 283 (1988)(the ITA has "some latitude not to comply with all requests to investigate further").

The plaintiff contends that the ITA's reliance on the general verification reports for BIL and BIC for the sixth-review period was misplaced. It argues that the BIC report was irrelevant because the concern is costs incurred by BIL on behalf of U.S. customers. As to verification of the latter's responses, the plaintiff avers that the focus of the agency was advertising expenditures for the Japanese market, not the United States, and that the ITA merely accepted what Brother presented.[22] For similar reasons, it argues that relying on the verification of BIL's indirect expense claim would not cover satisfactorily the subject of the 1988 Olympics because that claim concerned allocations to home-market sales and was verified by tracing through BIL's allocation method certain payroll figures "to a sales statistics chart and to the Brother Sales Ltd. financial report". Plaintiff's Reply, p. 12, quoting from R.Doc 272, p. 16. The plaintiff argues that the determination does not adequately confirm that no 1988 Olympic games advertising expenses were incurred.

On both counts the court concurs. The ITA's verification of BIL indeed was concerned with the claim for advertising expenses in Japan, not the United States. The report on BIL is substantial evidence in support of the determination that the expenses claimed were actually incurred, but the methodology used did not prove that the universe of data examined would have necessarily included advertising in the United States. Similarly, the verification report of Brother's claimed indirect

[21] *Cf.* H.R.Rep. No. 98-725, 98th Cong., 2d Sess. 43 (1984) ("The Committee * * * believes it essential to proper enforcement of the laws that information used in determining annually the actual amount of any * * * antidumping duty to be assessed under outstanding orders is accurate to the extent possible. At the same time, the Committee is concerned that requiring verification in every review would result in an unnecessary additional administrative burden on the Department of Commerce for perfunctory verifications. Therefore, verification would not be required if an interested party does not request it in a timely manner, or after recent verifications have taken place unless shown to be warranted").

[22] Plaintiff's Reply, p. 9. *See generally* BIL 1985-86 verification exhibits 224-243. The plaintiff continues "Because each of the advertisements identified included a specific model portable electric typewriter (and none of the advertisements included the EM-series machines) ITA obviously did not verify Brother's advertising expenses with respect to its Olympic sponsorship promotion or its generic image advertising." *Id.* at 11.

expense allocation to home-market models represents substantial evidence that the expenses claimed had been properly allocated, but the methodology followed does not appear to have been comprehensive enough to have confirmed that no such expenses were incurred by BIL. Although the parties do not dispute that 1988 Olympics advertising expenses would have appeared as inconsistencies in a comprehensive tracing of the claimed allocation of indirect expenses, the verification relied upon was that of expenses incurred by Brother Sales Limited ("BSL"), not BIL. Furthermore, there is no indication that the advertising necessarily would have been BSL's responsibility.

In sum, the ITA stated that, based on the verification reports, it uncovered "no inconsistencies" to indicate that 1988 Olympic advertising expenses had been incurred, but, then again, it would not have, for evidence to that effect, if any, had to have been sought elsewhere.

III

The plaintiff also complains that the ITA's acceptance of Brother's averaging of credit costs was unrepresentative of the transactions under investigation. During the review proceedings, the petitioner argued that Brother had on hand actual credit information for each customer and requested that credit expense calculations be based on such data rather than on the company's method of averaging. Brother contended that the ITA had permitted averaging of credit costs in the past and that it would have been an impossible task to report transaction-specific payment periods since they were linked to invoices and not to particular products. The agency determined, "as in the prior review, that the use of averaged collection periods is reasonable." 53 Fed.Reg. at 40,298.

Section 620 of the Trade and Tariff Act of 1984 amended 19 U.S.C. § 1677f-1 to provide, in pertinent part:

> (a) In general
>
> For the purpose of determining United States price or foreign market value * * * and for the purposes of carrying out annual reviews * * *, the administering authority may * * * use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required * * *.
>
> (b) Selection of samples and averages
>
> The authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.

Sampling is thus considered a reasonable expedient when the ITA is faced with a large number of transactions or adjustments. *See* H.R.Rep. No. 98-725, 98th Cong., 2d Sess. 45-46 (1984). To be "representative" of actual transactions and thereby comport with the statute, sampling

should reach essentially the same result as transaction-by-transaction analysis.

The record shows that the ITA allowed the calculation of credit expense costs applying the formula *d*/365 x *i* x unit price, where *d* represented the number of days of credit extended and *i* the daily rate of interest. *See* R.Doc 548, p. 11. The agency "used actual accounts receivable data to calculate average payment time and used this information to compute credit expenses on an annual basis". Defendant's Response, pp. 30-31, citing ConfDoc 110.

The plaintiff claims that "averaging has a distortive effect on calculations of the dumping margin when sales occur seasonally in peak promotional periods." Plaintiff's Motion for Partial Judgment, p. 2. Referring to "reports regarding pricing conditions in the U.S. market[ ] recorded by Smith Corona's sales personnel in the ordinary course of business", the plaintiff argues that "Brother would provide terms of *up to* 150 days on sales to specific customers during promotional periods", which, it claims, is proof that the averaging of credit costs skewed the dumping margins. Plaintiff's Memorandum, p. 43 (emphasis added). If *d* equalled 150 days, the plaintiff finds that the real cost of credit to be more than twice as high as that accepted by the ITA. It refers to *Serampore Industries Pvt. Ltd. v. U.S. Dep't of Commerce*, 11 CIT 866, 874, 675 F.Supp. 1354, 1361 (1987), to imply endorsement of transaction analysis and contends that *Certain Stainless Steel Cooking Ware From Korea*, 51 Fed. Reg. 42,873 (Nov. 26, 1986), *amended*, 51 Fed.Reg. 46,883 (Dec. 29, 1986), *Certain Tapered Journal Roller Bearings and Parts Thereof From Italy*, 49 Fed.Reg. 2, 278 (Jan. 19, 198), and other determinations indicate that the agency's preferred approach is to use actual credit costs as the basis for adjustment. The plaintiff quotes *Light-Walled Welded Rectangular Carbon Steel Tubing From Taiwan*, 54 Fed . Reg. 5, 532, 5, 536 (Feb. 3, 1989), in which the ITA, confronted with a request to use average credit costs allegedly due to inability to distinguish which sales were made on credit and which were not, stated that "the use of any average expense for all sales would have been highly distortive." Plaintiff's Memorandum, p. 47.

These references of the plaintiff do not lend sufficient support. *Serampore Industries* merely clarified that it may be proper to exclude from the universe of data to be analyzed items the inclusion of which the ITA concludes would be distortive. That case is not dispositive of whether or not the sample or average here was unrepresentative. Similarly, *Cooking Ware, Roller Bearings* and *Carbon Steel* do not indicate that sampling would not be more practicable and non-distortive – and hence preferred – under particular circumstances. The defendant admits that "the *preferred* method of calculating credit costs adjustment is by using a transaction-by-transaction method." Defendant's Response, p. 28 (emphasis in original), citing *N.A.R., S.p.A. v. United States*, 13 CIT ____, ____, 707 F.Supp. 553, 558 (1989). However, this preference is not legally compelled, only when it is shown that alternative sampling

was unrepresentative or otherwise distortive of the results. Of course, care must be used in sample selection, but, as the defendant states here, while "the number of sales of Brother's PETs increased during certain periods during the year, there is no evidence that the terms of payment were any longer or more favorable to a U.S. purchaser for PETs purchased during a peak selling period." Defendant's Response, p. 31, n. 15. Nor is there any showing that the sample chosen was otherwise distortive. Merely because a party has transaction-by-transaction data available is not reason, in itself, to order its production.

IV

In view of the foregoing, plaintiff's motion for partial judgment on the agency record is granted to the extent that this matter is remanded to the ITA to verify whether 1988 Olympic games advertising expenses were incurred by Brother during the 1985-86 administrative review period. The agency may have 60 days from the date hereof to comply with the remand and report the results thereof to the court, whereupon the plaintiff may have 30 days thereafter in which to respond, and the defendant and the intervenor-defendants may have 15 days to reply thereto.

In all other respects, plaintiff's motion for partial judgment on the agency record must be, and it hereby is, denied.

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